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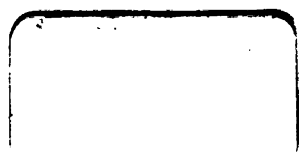
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*U. S. Circuit Court Reports*

**REPORTS**

OF

**CASES DECIDED**

BY THE

**HONOURABLE JOHN MARSHALL,**

LATE CHIEF JUSTICE OF THE UNITED STATES,

IN

**The Circuit Court of the United States,**

FOR THE

**DISTRICT OF VIRGINIA AND NORTH CAROLINA,**

**FROM 1802 TO 1833 INCLUSIVE.**

---

EDITED BY

**JOHN W. BROCKENBROUGH,**

COUNSELLOR AT LAW.

---

**IN TWO VOLUMES.**

**VOL. II.**

**PHILADELPHIA:**

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## ERRATA IN VOL. II.

Page 9, line 5, for "Hon. George Hay," read "Hon. St. George Tucker."  
Page 317, line 14 from bottom, for "Hon. P. P. Barbour," read "Hon. George Hay."



# **Circuit Court of the United States.**

**VIRGINIA, MAY TERM, 1822.**

**BEFORE**

**Hon. JOHN MARSHALL, Chief Justice of the United States.**

**Hon. GEORGE HAY, District Judge.**

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## **THE UNITED STATES V. MANN.**

An officer of the United States, who has levied a sum of money on an execution in favour of the United States, to whom the United States are indebted for fees of office in a sum greater than the amount of the execution, has a right to retain it by way of set-off, and on a motion made on the part of the United States to commit the officer for failure to pay over the money so levied, he will be permitted to show that the United States are indebted to him, and if this be shown, it is sufficient cause why he should not be attached.

The rules prescribed by the treasury department for the adjustment of claims against the government, will, if reasonable, be respected; but if these rules go to a complete denial of justice, the Court, if it have jurisdiction of the subject, cannot disregard the rights of the parties.

THE opinion of the Court, which states all the essential facts of the case, was delivered by

MARSHALL, C. J.—This is a motion on the part of the United States to commit William Mann, late deputy marshal of this  
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*The United States v. Mann.*

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district, on an attachment for not paying over a sum of money levied by him on an execution issued from this Court, on a judgment obtained by the United States: and a motion on the part of the said Mann, to discharge the said attachment, because the United States are indebted to him in a larger sum, for fees due to him as deputy marshal, which fees the treasury department has refused to pay.

The deputy marshal has exhibited a long account for fees against the United States, many items of which are substantiated beyond controversy. His counsel contends that his account is clearly supported, to an amount exceeding the sum claimed by the United States. The Court will not enter into a minute examination of the particulars of this account, because, if the principle should be established in favour of allowing the credits claimed, their amount may, in such a case as this, be the proper subject for a reference to a commissioner; and, should this principle be rejected, the examination will become useless.

Nothing can be more clear than the right of the officer to receive his fees for services performed for the United States. In equity and justice, the claim is founded on service actually rendered. This just and equitable claim is recognised by the acts of Congress, which regulate its amount. The law fixes the sum to which the marshal shall be entitled for those services which the law requires him to perform, and makes no distinction between the suits of the United States and those of an individual. The demand of the marshal, then, on the United States, for his fees of office, is as clear, both in law and equity, as his demand would be against any individual for whom the same services were performed. The United States have not sought to discriminate in this respect between themselves and other suitors. They have not required their officers to labour for the government gratuitously. The law acknowledges the obligation of the United States to pay for services rendered, in common with all others for whom the same services may be rendered.

The United States are not, it is true, subject to those coer-

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The United States v. Mann.

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cive measures which may be employed against an individual; but the duty is the same, and the theory of the law is, that this duty will be respected. Officers are appointed for the liquidation of these claims, and appropriations are made for their payment. The law is violated when these are disregarded.

The treasury department may certainly prescribe its own rules for the adjustment of such claims, and those rules will, if reasonable, be respected. The dependent situation of the officers who claim, will in general secure their respect, and the desire for the preservation of that harmony which ought to exist between the departments, will secure that of the Court. But when these rules go to a total denial of justice, to an absolute refusal to allow a just and legal claim, a court cannot, if it has jurisdiction of the subject, disregard the rights of the party.

It may be convenient, and may conduce to the regularity of these accounts, to the course established for them in the proper department of the treasury, to require that the officer, in suits against public debtors, should receive his fees out of the money made by an execution. In the ordinary course of things, this may be reasonable, and the officers of the court acquiesce in it. But if the United States do not proceed to judgment, or if they do not place the execution in the hands of the officer—if they receive the money through a different channel—or make any arrangement by which the officer is deprived of all means by which his claim can be satisfied, otherwise than by a direct resort to the treasury—on what principle can his application to the treasury be resisted? He has performed service for the government, for which the law entitles him to a certain remuneration, and gives the government the power to reimburse itself from the individual against whom a judgment for costs is rendered. The claim against the individual is in favour of the government, not of the officer. The government settles this claim, and either receives the fees of the officer, or relinquishes them. On what pretext can the claim of the officer on the government be rejected?

The clearest principles of equity and law require that it should not be rejected, and if a court be permitted to take juris-

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diction of the subject, it cannot be disregarded, without disregarding also the soundest principles of law.

In an action brought by an individual against an officer, for money made by an execution, the officer would, we think, be at liberty to show that the individual was indebted to him, and would be at liberty to set-off such debt. Were it doubtful whether such an offset would be allowable in every case, it cannot, we think, be doubted that it would be allowed in many cases. If, for example, an officer had earned fees to a large amount from an individual, and were to stop the whole of them out of a particular execution, no court would overrule his claim. If, instead of an action, an attachment be resorted to, the law is, we think, the same; the duty of the officer is to bring the money into court, and should he fail to perform this duty, it is a contempt for which the court will attach him. But this attachment will not be enforced if he shows sufficient cause against it. It will not be enforced if he shows that he has paid the money to the plaintiff; neither will it be enforced, we think, if he shows that he stands, in relation to the plaintiff, in the same situation as if he had paid to him the identical money made by the execution.

We will not now inquire into the course which ought to be pursued with an officer who speculates on the situation of the plaintiff, and procures the assignment of demands against him; but we think that a direct demand of the officer in his own right upon the plaintiff, for which he is entitled to an immediate satisfaction in money, clears the contempt, and ought to arrest the attachment. The argument is the stronger if the creditor, from any cause, cannot be coerced to pay this demand.

These are principles which would govern in a case between individuals; their application to a case of the United States has been doubted; that doubt appears to us to be removed by the opinion of the Supreme Court in the case of *The United States v. Wilkins*, reported in 6 Wheaton. (1) In that case, the Court,

(1) 6 Wheaton, 135. 5 Cond. Rep. Sup. Ct., U. S. 38. See also *U. States v. M'Daniel*, 7 Peters, 1.—[Editor.]

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speaking of the discounts allowed by the act of March 3d, 1797, ch. 74, in suits brought by the United States, says: "There being no limitation as to the nature and origin of the claim for a credit which may be set up in the suit, we think it a reasonable construction of the act that it intended to allow the defendant the full benefit at the trial of any credit, whether arising out of the particular transaction for which he was sued, or out of any distinct and independent transaction which would constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States."

The attorney for the United States would withdraw the case at bar from this opinion, because it was given in a case of contract, and in a suit regulated in some manner by the act of Congress which it expounds. But we think the opinion applies substantially to this case. By examining the act referred to, we perceive that it gives no right whatever to use any discount, but regulates and restrains a right recognised as already existing. The words of the law are not that in such a suit the defendant shall be allowed to give equitable or legal discounts in evidence, but that the cause shall be tried unless the defendant shall make oath "that he is equitably entitled to credits, &c.," and that "no claim for a credit shall be admitted on trial but such as shall appear to have been presented to the accounting officers of the treasury," &c.

These words apparently give no right whatever, but recognise a pre-existing right; and if it was a pre-existing right, it existed in other cases as well as in those contemplated by this act.

The opinion of the Supreme Court then in the case of *The United States v. Wilkins*, is, we think, expressly in point; and we are governed by it in the present case. We think that Mr. Mann is entitled to set-off the fees earned by himself, for which the United States are liable, and that so far an attachment ought not to go against him; if there be any doubt respecting the amount, a commissioner must report upon it to the court.

## FURNISS, CUTLER &amp; STACEY, v. ELLIS &amp; ALLAN.

Before Hon. JOHN MARSHALL, Chief Justice of the United States.

The law which governs pleading in Virginia is different from that which regulates it in England. In England, the courts exercise a controlling power over the defendant who seeks to plead inconsistent matters, conferred by 4th and 5th Anne, ch. 16, and it is discretionary with them to receive or reject the inconsistent pleas which may be tendered. But in Virginia, the right to "plead as many several matters, whether of law or of fact, as he shall think necessary for his defence," is expressly given by statute, and the courts cannot control that right, *if the pleas be offered in time*. [Where they are not so offered, (as where the defendants permitted a writ of inquiry to be entered against them, and the term at which it might be set aside to pass away without pleading,) the English doctrine then applies, and the right depends upon the favour of the court.] Hence, when in an action of assumpsit, the defendants at the rules pleaded both the general issue and demurred, and the plaintiffs took issue on the plea, but refused to join in demurrer, this was held to be a discontinuance, by virtue of the act of assembly, and the plaintiffs were nonsuited, though they were permitted to reinstate their cause.

A demurrer is in its nature a plea *to the action*, and will not be considered as a plea *in abatement*, though the special causes alleged for demurring be matter of abatement. The court will disregard those special causes, and considering the demurrer independently of them, will decide upon it as if they had not been inserted in it.

The plaintiffs' counsel filed a memorandum with the clerk, and the latter in filling up the writ, mistook the name of one of the plaintiffs. The clerk also drew the declaration in which the same mistake occurred. Upon a motion to amend the pleadings, it was held: 1. That the memorandum of counsel was a document by which the error in the writ might be amended, on the ground of *clerical misprision*. 2. That the error in the declaration might also be amended, but *not on the ground of clerical misprision*. It is no part of the clerical duty to prepare the declaration for counsel. In such a case, the clerk must be regarded as the agent of the attorney, and the declaration is to be treated as if it was drawn and filed by the attorney himself. Therefore, though the court should give leave to amend the declaration, *when amended*, it must be considered as a *new declaration*, and the defendants should be permitted to plead *de novo*.

THIS was an action of assumpsit brought by Furniss, Cutler & Stacey, an English mercantile house, against Ellis & Allan, merchants and partners in the city of Richmond. The counsel for the plaintiffs left with the clerk a memorandum di-

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recting suit against the defendants, and the clerk, in filling up the writ, mistook the name of the plaintiff Stacey for Staney. The declaration also was drawn by the clerk, and the same error occurred in that. The variance was not between the declaration and writ, but between the declaration and writ on the one hand, and the memorandum of counsel on the other. The defendant at the rules pleaded the general issue of *non assumpsit*, and also cravedoyer of the plaintiffs' writ and the memorandum of counsel, and demurred to their declaration, setting forth in their demurrer, as special ground of demurrer, matter in abatement, viz., that the persons to answer whose plea of trespass on the case the defendants were taken and were in custody, were not the same persons named as plaintiffs in their declaration. The plaintiffs took issue on the plea of *non assumpsit*, but refused to join in demurrer, and judgment was entered at the rules for the defendants upon the demurrer. Notwithstanding this, however, the clerk set the cause down for trial among the writs of inquiry. The plaintiffs moved the court to strike out the demurrer, and proceed to trial upon the issue joined. They also moved that they be allowed to amend the error assigned as cause of demurrer, on the ground of clerical misprision.

MARSHALL, C. J.—This motion is sustained by the allegation that the demurrer ought not to have been received by the clerk; and consequently admits of no inquiry into its sufficiency, farther than is necessary to determine on the right to offer it.

It was offered at a time when the right to plead was complete and under a law which authorizes the defendant to plead as many several matters, both of law and fact, as he may think necessary for his defence.(1)

From the comprehensive letter of this law, there would be some difficulty in excluding any plea which the defendant might

(1) "The plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law or fact, as he shall think necessary for his defence." 1 Rev. Code (of Virginia) of 1819. Vol. I, p. 510, § 88.—[Editor.]

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offer at a time when he had a right to offer it. The sufficiency of the plea is not submitted to the clerk. He cannot judge of it. Consequently, it would seem, he must receive it if it be tendered in proper time.

But the plaintiffs contend that there is in the nature and fitness of things, an objection to the allowance of inconsistent matter to be pleaded in the same cause which must enter into the construction of the act of assembly, and control, or at least influence, the meaning of its words. There is, they say, this inconsistency in a demurrer to the whole declaration and a plea to the whole. The demurrer confesses all the facts, and the plea denies them all.

But a demurrer confesses those facts only which are sufficiently pleaded; and the plea, as the plea of non-assumpsit, though it admits nothing, is not false, though many of the facts alleged in the declaration are true. It amounts to pleading double, but not to a positive inconsistency. I cannot however admit, that it is beyond the power of the legislature to pass an act allowing inconsistent pleas, or that a court can disregard such an act.

The plaintiffs' counsel supports his argument by reference to several English authorities, to all which it may be observed, that the law which governs the practice in England, is different from that which governs the practice in Virginia. The statute of 4 & 5 Anne, ch. 16, allows the defendant to plead several matters only with the leave of the court. The English statute gives to the court a controlling power over the admission of the plea: the statute of Virginia gives the court no such power. In the exercise of this controlling power, the courts of England have prescribed rules by which they will be governed in granting or refusing an application to plead different matters. But the courts of Virginia can prescribe no such rules. The law declares that the defendant may plead as many several matters of law and fact as he pleases, without making any application to the court necessary. The defendant in England is, when he first pleads, in the same situation as to a double plea, that the



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defendant in Virginia is, after his right to plead depends on the favour of the court.

But the cases quoted to show that the demurrer is not good, do not show that, even in England, it ought not to be received, if tendered in proper time. In 5 Bac. Abr. 459, it is said, "if a defendant demur in abatement, the court will, notwithstanding, give a final judgment, because there cannot be a demurrer in abatement." This does not prove that the demurrer itself shall be rejected, but that it shall be received and that the judgment upon it shall be final. A judgment on a plea in abatement, or on a demurrer to a plea in abatement, is not final, but on a demurrer which contains matter in abatement it shall be final, because a demurrer cannot partake of the character of a plea in abatement. Salkeld, 220, is quoted by Bacon and is to the same purport, indeed in the same words. These cases show that a demurrer being in its own nature a plea to the action, and being even in form a plea to the action, shall not be considered as a plea in abatement, though the special causes alleged for demurring be matter of abatement. The Court will disregard those special causes, and considering the demurrer independently of them, will decide upon it as if they had not been inserted in it.

These cases go far to show that the Court would overrule this demurrer, and decide the cause against the party demurring, not that it should be expunged from the pleadings.

[1 Tidd, 475.] "If the defendant plead in abatement, &c." These cases show that if a plea in abatement be tendered when it is not receivable, the plaintiff may proceed as if no plea had been offered, or he may move the court to strike it out. It is obvious that they do not apply directly to the case at bar. This demurrer was receivable when it was tendered.

But the counsel brings this case within their reasoning, by considering the demurrer as a plea in abatement. Now, this it cannot be. The cases cited from Bacon and Salkeld, show that a demurrer cannot be in abatement. The Court, therefore, can consider this only as a general demurrer, and, of course, it was offered in proper time.

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Tidd (484, 485,) shows, that where a defendant is under a judge's order to plead issuably, and he pleads a plea which is not issuable, or puts in a sham demurrer, the plaintiff may consider it as a mere nullity.

But these defendants were not under a judge's order to plead. They were not acting under the guidance of the court, but acting by authority of the law of the land, according to their own judgment. Had they permitted a writ of inquiry to be entered against them, and the term at which it might be set aside to pass away; or had they been in a situation in which they could not plead but under the direction of the court, this doctrine would certainly be applicable to the case. At present, I think it is not.

Tidd (482) (1) shows that the court will set aside irregular proceedings. But this is not an irregular proceeding. It is perfectly regular. The demurrer was offered in proper time, and though it may not be sustainable, it must be considered. Any plea in bar may be unsustainable; but it is not on that account to be discarded without being considered.

The cases cited from the Term Reports only confirm the doctrines of Tidd.

In another book of practice which has been cited, it is said: "But if the demurrer be frivolous, only to put off the trial or for delay of the proceedings, they will not allow of such a demurrer, nor cause the other party to join, but will give judgment against the party upon his frivolous demurrer."

It would require a person more conversant with the English practice than I am, to understand precisely the bearing of this dictum. The court must examine the declaration, to determine whether a demurrer be frivolous. Although the special causes assigned for demurring may be frivolous, the demurrer itself may be substantial. But be this as it may, the rule is inapplicable to this case, and perhaps to the practice of this country. The

(1) These references are to the second American from the eighth London edition of Tidd's Practice. (1828.) [Editor.]

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demurrer, according to our practice, can produce no delay, cannot put off the trial of the cause. Had the plaintiffs joined in demurrer, and it had appeared to be frivolous, a writ of inquiry would have been awarded and executed immediately; or the issue would have been tried without allowing a continuance. A frivolous demurrer, therefore, in this case, could not put off the cause, or have occasioned any delay. I do not know what delays, according to the practice of England, a frivolous demurrer may occasion. But this doctrine is founded on the controlling power of the courts of England over pleading, a power which the courts of this country do not possess.

If the demurrer in this case was receivable, and I think it was, the refusal to join in it was a discontinuance which is provided for in the act of assembly. The plaintiffs must be nonsuited. This proceeding, however, is now under the direction of the Court, and the cause may certainly be reinstated.

I come now to consider the application to amend.

I have no doubt of the power of the Court to allow amendments in all cases of clerical misprision, where there is any thing to amend by, but I had doubted whether the memorandum of counsel was a document by which an amendment would be made. The cases cited by Mr. Call have in a great measure removed that doubt, and I am inclined to permit an amendment of the writ. An amendment of the declaration will be allowed also, but not on the ground of clerical misprision. To copy a declaration in order to file it, is no part of the duty of the clerk. He acted as the agent of the plaintiff's attorney. It is to be considered as a declaration drawn and filed by the attorney himself. In every such case the amendment will be allowed, but it is a new declaration, and the defendants are permitted to plead *de novo*.

This motion involves no question about the recognisance of the bail. I do not at present perceive how that recognisance can avail the party, but I do not understand that the motion extends to it.

JAMES HOPKIRK, Surviving Partner of SPIERS, BOWMAN & Co. v.  
WILLIAM BYRD PAGE, Executor of WILLIAM BYRD, deceased.

Before Hon. JOHN MARSHALL, Chief Justice of the United States.

If the drawer of a bill of exchange has no funds in the hands of the drawee, and has no right to expect it will be paid, there being no commercial transactions between the parties, notice of non-payment and protest is unnecessary. But where the drawer has a right to expect that his bill will be honoured, as where there are running accounts between the drawer and drawee, he is entitled to notice, although in point of fact he had no funds in the hands of the drawee when the bill was drawn. The sound sense and justice of the exception is, that where a drawer knows he has no right to draw, and has the strongest reason to believe that the bill will not be paid, the motives for requiring notice of the dishonour do not exist, and his case comes within the reason of the exception. Consequently, where a bill of exchange was drawn by W. B. on R. C. & Co., for £246 3s. 7d., the drawees having notified the drawer that his bills would not be honoured, although the drawees held in their hands a balance due to the drawer of 16s. 11d., notice of the non-payment and protest may be dispensed with, as such a case comes completely within the *reason* of the exception.

It is a general rule, that a long acquiescence in letters containing accounts, is *prima facie* evidence of the correctness of their contents.

Where a protested bill of exchange is held up for a long time without notice of its non-payment and protest, the whole *onus probandi* is thrown upon the holder. He must prove every thing, and nothing is required from the drawer.

A bill of exchange was drawn in Virginia, in November, 1775, after the commencement of hostilities between Great Britain and her colonies, payable in England, which was duly protested for non-payment in June, 1776, after all intercourse between the two countries had ceased. *Held*, that a state of war dispenses with the necessity of giving notice of the non-payment and protest to the drawer, but notice of its dishonour should be given within a reasonable time after the impediment is removed.

W. B., living in Virginia, draws a bill of exchange in November, 1775, on R. C. & Co., merchants in London, which was duly protested in June, 1776. W. B. died in 1777 or 1778. Payment was not demanded of the representative of W. B. till 1819, when suit was instituted on the protested bill. *Quærs*, does the doctrine of presumption of payment, arising from lapse of time, which is applicable to sealed instruments, apply to a bill of exchange? *If it does*, such presumption is merely *prima facie*, and the holder may rebut it by accounting for the time which has been permitted to elapse, and by showing the improbability that the debt has been paid. Should this presumption be rebutted, still the plaintiff shall only recover legal interest from the assertion of his claim.

Bills of exchange are transferable, not by force of any statute, but by the custom

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of merchants. Their transfer is regulated by usage, and that usage is founded in convenience. A deed, therefore, from A. to B., conveying a great number of bills, bonds, notes, &c., cannot be considered as a negotiation of the bills on mercantile principles, so as to authorize the holder to sue in his own name, though such an instrument may be considered as conveying an equitable interest, the right to receive the money.

It is a general rule in equity, that all persons having distinct interests must be brought into court; but where the interest of A. is involved in that of B., and A. possesses the legal right, so that the interest may be asserted in his name, it is not always necessary to bring both before the court.

THIS was a suit brought in 1819, on the chancery side of this Court, by James Hopkirk, a subject of the king of Great Britain, and surviving partner of Spiers, Bowman & Co. merchants of Glasgow, against the defendant, William Byrd Page, executor of William Byrd, deceased, to recover the amount of two bills of exchange, drawn by the said William Byrd, late of Westover, Virginia, on Robert Cary & Co. of London. The first bill was for £353 6s. sterling, payable at sixty days sight to Edward Brisbane or order, and bearing date July 19, 1774, which bill was indorsed by the said Brisbane to Alexander Spiers, and by him indorsed to Spiers, Bowman & Co. The second bill, bearing date the 26th of November, 1775, was for £246 3s. 7d. sterling, was also payable at sixty days' sight. The bills were severally presented to Robert Cary & Co., the first on the 4th of September, 1774, and the second on the 24th of April, 1776, and at those dates respectively noted for non-acceptance, the said Robert Cary & Co. having refused to accept them, and when they respectively arrived at maturity, payment being demanded and refused, they were duly protested for non-payment. The complainant avers in his bill, that notice of the protests were duly given to the drawer in his lifetime, and required his executor, the defendant in this cause, to produce, on oath, all the books and papers of his testator to the Court, before the hearing of the cause, and relied on them as furnishing evidence that notice of the protests aforesaid was regularly given. Should such evidence not be supplied, however, it is further alleged, that at the time that the bills were drawn, the drawer had no funds in the hands of the drawee,

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and the plaintiff insists that this circumstance dispenses with the necessity of giving notice of the protest: that shortly after the first bill was drawn, the revolutionary war between Great Britain and her colonies commenced, and at the date of the protest of the last bill, was raging so as to intercept and prevent the prosecution of any successful remedy against William Byrd: that William Byrd died in 1777, greatly indebted, though possessed of a very large estate, and appointed his widow, Mary Byrd, his executrix, who qualified as such in the same year: that the said executrix proceeded, while the war was still raging, to administer the estate of her testator, selling all the personal estate in possession, and appropriating the proceeds to the payment of other debts, so that in 1785, according to the account of her executorship then rendered, she had administered the whole of the effects of the estate of her testator, though no part of them was applied to the payment of the said protested bills: that at the date of the protests, the plaintiff and his co-partner were, and had always continued, to the date of the institution of this suit, non-residents of the state of Virginia, and residents of Great Britain, and that before the courts of Virginia were open to an effectual prosecution of suits for British debts, the whole ostensible assets of the said Byrd were disbursed, or claimed to be disbursed, and when the impediments which had been opposed to the prosecution of such suits were removed, the prospect of a suit against an estate, ostensibly insolvent, was too discouraging to permit the institution of this suit. But it was alleged that assets to a large amount had recently come to the hands of the executor of Byrd, out of which the plaintiff prayed satisfaction of the afore-said protested bills of exchange.

William Byrd Page admits, in his answer, that the signature to the said bills is in the handwriting of his testator, but does not admit that Byrd had notice of their dishonour. He denies, that at the time the bills were drawn, the drawer had no funds in the hands of the drawees. William Byrd was for some years in the habit of shipping large quantities of tobacco to

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Robert Cary & Co., his merchants in London. They also sold for him his estate in England for £15,000 or £20,000 sterling. He therefore requires the plaintiff to produce evidence of the notice of the dishonour of the bills, or of such facts as will dispense with the necessity of proving notice. He further pleads the statute of limitations of Virginia in bar of a recovery, while he does not admit that all the members of the firm of Spiers, Bowman & Co. have always resided out of the state of Virginia: he insists that the fact of their having branches of their mercantile house at Petersburg and other places in Virginia, and agents and factors in this state, will preclude the plaintiff from availing himself of the exception in the act of limitations in favour of persons beyond seas. But if the act of limitations does not create an absolute bar to a recovery, he still relies on the great lapse of time as furnishing a strong presumption of their payment.

MARSHALL, C. J.—This suit is brought to obtain payment of two bills of exchange drawn by the late William Byrd, of Virginia, on Robert Cary & Co., merchants of London, the one in the year 1774, and the other in 1775. These bills were regularly protested; but the defendant makes several objections to paying them. The first to be considered is, that no notice of their non-payment and protest was given either to William Byrd in his lifetime, or to his representatives, since his death.

The plaintiff contends that this notice was unnecessary, because the drawer had no funds in the hands of the drawee.

Although this application, in consequence of the state of the fund to which the plaintiff must resort, it consisting of equitable assets, is made to a court of equity, it is admitted to be a law case depending entirely on legal principles. It requires an attentive consideration of the question, how far the want of funds of the drawer in the hands of the drawee discharges the holder of a bill of exchange from the necessity of giving notice to the drawer of its dishonour.

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The rule requiring this notice was for a long time supposed to be general, and Mr. Justice Blackstone in his Commentaries,<sup>(1)</sup> lays it down without any exception. The first case in which an exception was admitted, is *Bikerdike v. Bollman*, decided in November, 1786, and reported in 1 Durn. & East, 405; in that case the court stated, that if it be proved by the holder that "from the time the bill was drawn till the time it became due, the drawee never had any effects of the drawer in his hands," notice to the drawer is not necessary. The reason given is, that he had no right to *draw*, and *could not be injured* by not receiving notice. An additional observation made by one of the judges is, that to draw in such a case "is a fraud in itself."

It does not appear from the report of this case, nor is there any reason to believe, that there were any running accounts between the parties; the whole complexion of the case, and the reasons assigned by the judges for their opinions, negative the idea; it is simply the case of a debtor drawing a bill on his creditor, without a prospect of its being paid. In such a case, notice is declared by the court to be unnecessary.

It is remarkable that in this case, although the principle is expressly asserted by both the judges, each declares that the case would be decided in the same way on a different principle.

In *Goodall and others v. Dolly*, decided in 1787, 1 Durnford & East, 712, the judgment was against the holder of the bill, for want of notice; but in giving his opinion, Mr. Justice Buller recognises the principle established in *Bikerdike v. Bollman*.

In *Rogers v. Stephens*, 2 Term Rep. 713, decided in 1788, the law is said to be settled, that no effects of the drawer in the hands of the drawee, excuses the holder from the necessity of giving notice, yet, it is remarkable that in this case, all three of the judges rely very much on a subsequent assumpsit made by the drawer.

In *Gale v. Walsh*, 5 Term Rep. 239, decided in 1793, the

(1) 2 Blackst. Com. 469.—[Editor.]



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principle appears to be recognised; but a rule to show cause why a new trial should not be granted for this cause, was discharged, because the fact did not exist in the case.

These are the earliest cases on this point; it has occurred very frequently in subsequent cases, and the principle seems to be firmly established; but as the question has come forward in different forms, and been viewed under different aspects, the principle has been greatly modified, and is no longer laid down in the general terms which were carelessly used on its introduction. It has been found necessary to define its extent with more precision, and to state the rule with more accuracy. It was perceived, that in the course of commercial dealing, it would frequently occur that a person might draw a bill with the best reasons for believing that it would be honoured, although, in fact, he might have, at the time, no funds in the hands of the drawee; and that all the reasons for requiring notice, would apply in such a case, with the same force as if the bill had been drawn on actual funds. In *Legge v. Thorpe*, 12 East, 171, *Le Blanc and Bayley*, Justices, stated the principle laid down in *Bikerdike v. Bollman*, and afterwards adhered to, in these terms:

They said, "that the court in that case, looking to the reason for which notice was required to be given, laid down the rule, *not generally*, that where the drawer had no effects in the hands of the drawee at the time, (which perhaps might turn out to be the case upon a future settlement of accounts between them,) no notice of dishonour should be given: but that it need not be given where the drawer *must have known* at the time that he had *no effects* to answer the bill, and could have no reason to expect that his bill would be honoured."

In *Blackhan v. Doren*, 2 Campbell, 503, Lord Ellenborough said: "If a man draw upon a house with whom he has no account, he knows that the bill will not be accepted, he can suffer no injury from want of notice of its dishonour, and, therefore, he is not entitled to such notice. But the case is quite otherwise where the drawer has a fluctuating balance in the hands of the drawee."

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In *Walwyn v. St. Quintin*, 1 Bos. and Pul., 554, one of the strongest cases in the books in favour of dispensing with notice, Eyre, C. J., said: "But it may be proper to caution bill-holders not to rely on it as a general rule, that if the drawer has no effects in the acceptor's hands, notice is not necessary. The cases of acceptances on the faith of consignments from the drawer, not come to hands, and the case of acceptances on the ground of fair mercantile agreements, may be stated as exceptions, and there may possibly be many others."

In *Brown et al. v. Maffey*, 15 East, 216, Lord Ellenborough said: "The doctrines of dispensing with notice of the dishonour of a bill has grown almost entirely out of the case of *Bikerdike v. Bollman*. That decision dispensed with the notice to the drawer, where he knew beforehand that he had no effects in the hands of the drawee, and had no reason to expect that the bill would be paid when it became due."

"But that exception must be taken with some restrictions, which, since I sat here, I have often had occasion to put on it, as where the drawer, though he might not have effects at the time of the drawing of the bill in the drawee's hands, has a running account with him, and there is a fluctuating balance between them, and the drawer has reasonable ground to expect that he shall have effects in the drawee's hands when the bill becomes due. In such cases, I have always held the drawer to be entitled to notice, because he draws the bill upon a reasonable presumption that it will be honoured."

In *Rucker et al. v. Hiller*, 16 East, 43, Lord Ellenborough said: "Where the drawer draws his bill in the bona fide expectation of assets in the hands of the drawee to answer it, it would be carrying the case of *Bikerdike v. Bollman* farther than has ever been done, if he were not at all events entitled to notice of the dishonour. And I know the opinion of my lord chancellor to be, that the doctrine of that case ought not to be pushed farther."

"The case is very different where the party knows that he has no right to draw the bill. There are many occasions where a drawee may be justified in refusing from motives of prudence

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to accept a bill, on which notice ought nevertheless to be given to the drawer; and if we were to extend the exception farther, it would come at last to a general dispensation with notice of the dishonour, in all cases where the drawee had not assets in hand at the very time of presenting the bill; and thus get rid of the general rule requiring notice, than which nothing is more convenient in the commercial world. A bona fide reasonable expectation of assets in the hands of the drawer, has been several times held to be sufficient to entitle the drawer to notice of the dishonour, though such expectation may ultimately fail to be realized."

And in the same case, Bayley, J., said: "The general rule requires notice of the dishonour to be given in due time to the drawer, and it lay upon the plaintiff to show that he could not possibly be injured by the want of it. It would be somewhat hard to call upon the drawer towards the end of six years after the bill given; and when he objected that he had no notice of the dishonour, to tell him that he had no effects in the drawee's hands at the time when the bill was presented, though they might have come to his hands the very day after, and the drawee might have settled his accounts with the drawer on the presumption that the bill was paid."

The subject was considered by the Supreme Court of the United States, in the case of *French v. The Bank of Columbia*, reported in the fourth volume of *Cranch*. (4 *Cranch*, 141, 2 *Cond. Rep.*, 58.) In that case, it was said,(2) "to be the fair construction of the English cases, that a person having a right to draw in consequence of engagements between himself and the drawee, or in consequence of consignments made to the drawee, or from any other cause, ought to be considered as drawing upon funds in the hands of the drawee, and, therefore, as not coming within the exception to the general rule." When the drawer is continually making consignments to the drawee, and continually drawing on those consignments, his conduct may be essentially affected by knowing that any of his

(2) By Marshall, C. J., who delivered the opinion of the Court.—[*Editor*.]

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bills have been protested. He may stop *in transitu*, or may suspend further consignments. It may be as material to his interest to place no more funds in the hands of the drawee, in such a case, as to withdraw the funds previously placed in his hands. Notice may be as important to him in the one case as in the other, and there seems to be the same reason for requiring it.

Supposing the rule to be, that every person having a *right to draw*, or having reason to believe that his bill will be honoured, is entitled to notice,(3) I will proceed to apply the principle to the facts of this case; and in doing it, I shall consider the two bills separately.

On the 19th of July, 1774, William Byrd drew on Robert Cary & Co., in favour of Edward Brisbane, for the sum of £353 6s. This bill was indorsed by Edward Brisbane to Alexander Spiers, and by him to the company. On the 17th of November, 1774, it was protested for non-payment. The first information that appears to have been given of this protest to

(3) The doctrine, with its modifications, as laid down in the above opinion of Chief Justice Marshall, and in the case of *French v. The Bank of Columbia*, has been examined and re-affirmed in a recent case decided by the Supreme Court of the United States. In the case of *Dickins v. Beal*, 10 Peters, 572, (January Term, 1836,) in delivering the opinion of the Court, and after a rapid review of the cases reported in the English books cited above, Mr. Justice Baldwin continues: "But unless he draws under some such circumstances, his drawing without funds, property, or authority, puts the transaction out of the pale of commercial usage and law; and as he can in nowise suffer by the want of notice of the dishonour of his drafts, that it is deemed an useless form. 'Notice, therefore, can amount to nothing, for his situation cannot be changed.' In a case where he has no fair pretence for drawing, there is no person on whom he can have a legal or equitable demand, in consequence of the non-payment or non-acceptance of the bill. This is the rule, as laid down by the Court in *French v. The Bank of Columbia*, 4 Cranch, 153, 164, on a very able and elaborate view of the then adjudged cases; which is fully supported by those since decided in England, and in the Supreme Court of New York. The case of the defendant falls clearly within the rule applicable to bills drawn without funds, or any bona fide, reasonable, or just expectation of their being honoured; and notice of their dishonour was not necessary." In truth, no principle of commercial law can be more firmly established, and it would seem that the only question which can hereafter arise with respect to it, will be, not as to the extent of the general doctrine, but in its application to the *facts* of the particular cases.—[Editor.]

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Colonel Byrd, or his representatives, was the institution of this suit in 1819.

The executor of Byrd resists its payment for want of notice, and the plaintiff alleges that notice was unnecessary, because the drawer had no effects at the time in the hands of the drawee. To support this allegation, he relies on several letters written by Robert Cary & Co. to William Byrd, which have been exhibited by the executor on his requisition.

The defendant objects to this testimony, that the letters are the mere allegations of Robert Cary & Co., and do not contain a full statement of the correspondence between the parties, or of their accounts: that Colonel Byrd may not have acquiesced in the accounts transmitted with these letters, or in the statements they contain, although, from the loss of papers, the death of parties, and the great lapse of time, the papers cannot now be produced.

The general rule is, that a long acquiescence in letters containing accounts, is *prima facie* evidence of an acquiescence in their contents; and there is less reason for excepting this case from the rule, because the letters of Robert Carey & Co., from November, 1773 to October, 1775, do not notice any objection, on the part of William Byrd, to any of the accounts which, one of those letters says, were annually transmitted to him.

The letter from Robert Cary & Co. to William Byrd, dated the 10th of November, 1773, incloses an account current, showing a balance due Robert Carey & Co. of £ 616 9s. 1d. This letter gives notice of the completion of a contract for the sale of Byrd's English estate; says the money is to be paid the 5th of April; that they shall immediately afterwards take up the whole of his bills; and says that they have referred Farrell & Jones to him, to determine whether they shall pay a debt of about £ 800, claimed by Farrell & Jones.

The next letter is dated the 13th of May, 1774. It states the receipt of £ 5000 on account of the estate which had been sold, and the expectation of receiving the farther sum of £ 11,500 on the same account. It states the payment of debts

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to the amount of £5544 7s. 4d. and gives a list of other debts due from Byrd, to the amount of £11,577. The letter concludes with saying, that by Greenland's estimate, the produce of the estate will not exceed £15,500, out of which great charges are to be deducted. From this sketch the letter proceeds, "You will be able to judge how the account may stand, and what bills must be returned."

It is observable, that among the debts paid, are several bills of exchange, which had been long protested, one of them as early as February, 1768. This fact shows an understanding by which bills were held up after a protest, in the expectation that they would be paid by the drawee, notwithstanding the protest. In such a case, if no notice be given, the law seems to be, that the holder looks to the drawee, not to the drawer, for payment.(4)

The next letter, of the 5th of August, 1774, states that there are many bills which must be returned, after paying all the money received on account of the English estate. This letter speaks of a further sum for a half year's rent, accruing before the purchaser took possession, to be received after Michaelmas. This would be £371 4s. 6d. There is, too, a subsequent letter, of the 14th of March, 1775, which mentions a farther receipt of £448 12s. 1d., on account of the English estate.

Colonel Byrd appears to have drawn to the full amount of his English estate, so far as Robert Cary & Co. had stated the money to have been received; and if the transactions between the parties had gone no farther, these letters would furnish strong reasons for the opinion that, in July, 1774, he acted at least incautiously in drawing the bill under consideration. But there were transactions between the parties. Colonel Byrd held a large estate in Virginia, and the usage of the considerable planters to ship their tobacco to London merchants, and to draw on their consignments, is of general notoriety. In their letter of the 17th of November, 1774, Robert Carey & Co. say: "We shall, in the disposal of your tobacco, hope to render you a safe and pleasing tale."

(4) Townsley v. Sumrall, 2 Peters's Rep. 170.—[Editor.]

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In a letter of the 10th of February, 1775, is an account of sales of fifteen hogsheads of tobacco, shipped in a vessel commanded by Captain Powers; and there is also notice taken of a mortgage on the estate sold to Mrs. Otway, for which no claimant had appeared, but for which Mrs. Otway had retained a considerable sum in her hands. The letter says, "We were compelled to settle the conveyance in the manner we did, yet at the same time, it no ways precluded you from receiving your part of this other mortgage, if no claimants." The letter shows that Colonel Byrd had written on this subject, and had manifested the expectation of receiving a further sum on this account. The letter mentions the payment of some small orders given by Byrd.

It may be considered as probable, from these letters, that Colonel Byrd was not perfectly satisfied with the sums retained on account of charges on the estate, and expected more money from it.

A letter of the 20th of June, 1775, states the payment of a draft drawn by Colonel Byrd, in favour of Hornsby, for £75, and their payment for his honour of another draft on Farrell & Jones for the same sum.

The last letter is dated 2d of October, 1775. It mentions the payment of several little drafts, as desired by Colonel Byrd, "which are mentioned in an account current inclosed," but the account itself does not appear. It shows a balance, as the letter says, of 16s. 11d. in favour of Colonel Byrd.

From this review of the letters in the cause, it is obvious that Colonel Byrd was much pressed for money; that he was sanguine in his calculations of the sums to be yielded by his estate in England; that he drew upon that fund by anticipation, and to an amount greater perhaps than was strictly justifiable. It is also apparent that a considerable part of the money for which the estate sold, was retained for incumbrances, some of which were questionable, and there is reason to believe that he questioned them. It is also apparent that there were running transactions between the parties, and that the holders of his bills were in the habit of retaining them, and of receiving payment

long after protest. That he made shipments of tobacco in the time, is unquestionable; but the amount of his shipments is uncertain; his letters are not produced; they would throw much light on this transaction. The letters giving notice of this particular draft, might, and probably would, show the idea on which it was drawn, and the calculations of the drawee; it might be drawn on actual consignment of tobacco, or it might be drawn on a calculation that something farther might be yielded by those items of the English estate, which the letters show had not finally been adjusted. These calculations may have been erroneous; but if they were made, the bill was not drawn with a knowledge that it would not be honoured, and therefore notice of its dishonour was unnecessary. The Court will not presume that these calculations were made; the Court will not presume that the letter of advice which usually accompanies a bill of exchange, did show that the drawer calculated on his bills being honoured; but the Court cannot presume the contrary; and it is to be recollected that when a protested bill is held up for a great length of time without notice, the whole *onus probandi* is thrown on the holder; he must prove every thing, and nothing is required from the drawer.

The case furnishes strong reason for the opinion, that this bill was not returned to Virginia, but was held up by Spiers, Bowman & Co. in the expectation of its being paid by Robert Cary & Co. It was drawn on the 19th of July, 1774, and protested for non-payment on the 26th day of November of the same year. Another bill for £213 15s., drawn on the 4th of July, 1774, in favour of Spiers, Bowman & Co., and protested on the 9th of November, 1774, was returned to Colonel Byrd, and was taken up; these bills drawn by the same persons, and held by the same house, at the same time, would probably have been returned by the same vessel had they been both returned. The circumstance that one was drawn in favour of Brisbane, an agent of the company, and indorsed by him to a member of the company, and by that member to the company, would not account for the appearance of one bill without the other, if both were returned. They were both the property of



the same company, both due by the same person, both in possession of the company at the same time, and would probably have been both returned, if they *were* both returned, by the same vessel. The bill, said not originally to have been drawn in favour of Spiers, Bowman & Co., would probably have been transmitted to the same agent to whom the other bill was transmitted. The appearance of the one bill without the other, is, then, a strong circumstance in favour of the opinion that the bill retained was held up in England in the expectation of its being paid by the drawee. In estimating the probabilities of the circumstances and prospects under which the bill was drawn, this fact is entitled to some consideration.

We have no regular accounts, no statements of the consignments made by Byrd to Robert Cary & Co. We know that their connexion was of long standing; that there was a considerable degree of mutual kindness and confidence; that Byrd was in the habit of shipping tobacco to Robert Cary & Co.; that there may have been a shipment at the very time this bill was drawn; that money was paid for Byrd by Robert Cary & Co., after this bill was protested; that a bill of £75 was taken up for his honour; and that in October, 1775, the balance of £616 9s. 5d., which stood against him in November, 1773, was converted into a balance of 16s. 11d. in his favour. We have not all the intermediate accounts, and we do not know how this balance may have fluctuated; add to this, that the bill is not said to have been protested for want of effects.

Under all these circumstances, I cannot say that the bill was drawn with a knowledge that it would be protested; and that notice of the protest could not be necessary. I cannot say that it was a fraud upon the payee, by giving him a bill which the drawer knew would not be paid. If the *onus probandi* lay on the drawer of the bill, the case would be clearly against him; but as it lies entirely on the holder, whose *laches* are without a precedent in a court of law or equity, I think he has not made out a case of complete justification, on which he can entitle himself to a decree for the bill drawn on the 19th of July, 1774.

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The second bill was drawn on the 26th day of November, 1775, for £246 3s. 7d., and was protested on the 26th day of June, 1776. It was drawn after the commencement of hostilities in Virginia; and before it was protested, all intercourse between the two countries was interdicted. Under these circumstances, notice is not to be expected, and ought not to be required. I at first doubted whether a bill, which, for a length of time, is held under circumstances which dispense with notice, does not lose its commercial character, and become an ordinary debt. But on reflection, I am satisfied that this idea cannot be sustained: and that to charge the drawer, notice of the dishonour of his bill ought to be given within a reasonable time after the removal of the impediment. The question, therefore, on this bill, also is, were the circumstances under which it was drawn such as to dispense with notice? Was it drawn without reasonable ground for an expectation that it would be paid? It may reasonably be supposed, that on the 26th of November, 1775, the letter of the 2d of October, 1775, which came by the last packet to New York, was received. In attempting to show that notice of the dishonour of this bill was unnecessary, because the drawer had no effects in the hands of the drawee, the holder is met *in limine*, by the fact that this letter shows a balance in his favour of 16s. 11d., and the exception under which the plaintiff withdraws himself from the general rule, is, that the drawer had at the time no effects in the hands of the drawee. If we may depart from the letter of the exception, there is no point at which to stop; and if notice may be dispensed with when a small sum is in the hands of the drawer, it may also be dispensed with when a large sum is in his hands, provided that sum be one cent less than the bill is drawn for.

I am aware of this argument, but think it more perplexing than convincing. There are many questions in which no precise line can be marked, which must depend on sound legal discretion, and where the case itself must be decided by a jury or by the court, acting on the principles which ought to regulate a jury. The sound sense and justice of the exception is, that

where a drawer knows he has no right to draw, and has the strongest reason to believe his bill will not be paid, the motives for requiring notice of its dishonour do not exist, and his case comes within the reason of the exception. Where all transactions between parties have ceased, and there is nothing to justify a draft but a balance of one penny, it would be sporting with our understanding to tell us, that a creditor for this balance, who should draw for a thousand pounds, would be in a situation substantially different from what he would be in, were he the debtor in the same sum. The true inquiry appears to me to be, whether the connexion between William Byrd and Robert Cary & Co. remained such as to justify a hope that his bill would be honoured, and to afford any shadow of justification for drawing it.

I think it as demonstrable as any proposition of this sort can be, that he knew that this bill would not be paid.

He had no funds in the hands of the drawee except 16*s.* 11*d.*, and no prospect of having any. He had made no shipment of tobacco by the last vessel, and Robert Cary & Co. speak of the fact with some resentment. In their letter of June, 1775, they had mentioned sending a vessel to Virginia chartered at a high price, in which they expected consignments of tobacco from their friends, and among others, from Colonel Byrd. In their letter of the 2d of October they say: "When Power came in, we were in hopes you would have offered him some assistance, but we observe the high price in the country was the cause of the disappointment, and no compliment to our charter. However, if we are no losers, we are not beholden to our friends for it."

With respect to the mortgage for which it had been supposed that the mortgagee was dead without a representative, he says, "it is feared the representative is found, but be this as it may," he adds, "the estate will be always liable, and therefore, without a proper indemnity, little can be expected. What indemnity you may offer we know not, but we shall not engage for our own parts." After mentioning the payment of some bills, they

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add, "but for paying any more, or raising money on the uncertainty of the mortgage, we shall not attempt."

With this letter before him, Colonel Byrd must have drawn, I think, with a moral certainty that his bill would be dishonoured: and if in any case a holder can be excused for not giving notice, this is that case. There was an end of all consignments, of all intercourse between the parties; there were no funds to withdraw, and no remittances to stop. The want of notice would be no injury to him. This case seems to me to come within the exception of *Bikerdike v. Bollman*, as modified in the subsequent cases.

This brings me to the consideration of the other objections made by the defendant to the payment of this bill.

He contends, that after such a lapse of time, payment must be presumed.(5)

(5) The statute of limitation did not apply to this case. See *Hopkirk v. Bell*, 3 Cranch, 454; 4 Cranch, 164. By the fourth article of the definitive treaty of peace, between the United States and his Britanic Majesty, of 1783, "it is agreed that creditors on either side shall meet with no lawful impediment to the recovery in full value in sterling money of all bona fide debts heretofore contracted," which fourth article is recognised, confirmed, and declared to be binding and obligatory by the second article of the convention between his Britanic Majesty and the United States, made on the 8th of January, 1802. By the fourth section of the act of limitation of Virginia, all actions of debt, detinue, &c., are directed to be brought within five years after the cause of action shall have accrued. By the 12th section of the same act, there is a saving of persons *beyond seas*, but by the 13th section, it is provided "that all suits hereafter brought in the name or names of any person or persons, residing beyond seas, or out of this country, for the recovery of any debts due for goods *actually sold and delivered here, by his or their factor or factors*, shall be commenced and prosecuted within the time appointed and limited by this act, for bringing the like suits, &c., notwithstanding the saving &c., to persons beyond the seas, at the time their causes of action accrued." The case of *Hopkirk v. Bell*, was certified from the Circuit Court of Virginia, in which the opinions of the judges, (Marshall, C. J. and Griffin, J.) were opposed upon the following question, to wit: "Whether the act of assembly of Virginia, for the limitation of actions pleaded by the defendant, was, under all the circumstances stated, a bar to the plaintiff's demand founded on a promissory note, given on the 21st of August, 1773?" The certificate contained the following statement of facts agreed by the parties, viz: That David Bell, the defendant's testator, has considerable dealings with the mercantile house of "Spiers, Bowman & Co." of Glasgow, (of which house the plaintiff was surviving partner) in the then colony of Virginia,

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Admitting the doctrine of presumption to be the same in respect of a bill as of an instrument under seal, of which I am not so confident,(6) still it is not a positive rule, depending absolutely,

*by their factors who resided in that colony*, and on the 14th of March, 1768, gave his bond to the company, &c., and on the 21st of August, 1773, Henry Bell, the defendant, executed his *promissory note* to Spiers, Bowman & Co. for £437 14s. 10d. and on this note this suit was instituted, on the 4th of January, 1803. That the said Spiers, Bowman & Co., were at that time British subjects, merchants resident in Glasgow, and had never resided in Virginia, and that James Hopkirk was then, and always had been, a British subject, resident in Great Britain, and never had been in Virginia. That the company had a factor or factors resident in Virginia on the 21st of August, 1773, when the note was given, and from that time to the commencement of the American war, on or about the 1st of September, 1776. That the company had neither agent nor factor in this country authorized to collect their debts from the commencement of the war until 1784. That on or about the 10th of September, 1784, and even since, an agent had resided in Virginia, authorized by power of attorney generally to collect all debts due to the company in Virginia.

The Supreme Court ordered the following opinion to be certified to the Circuit Court. "That upon the question in this case, referred to this Court from the Circuit Court, it is considered by this Court that the said act of limitations is not a bar to the plaintiff's demand upon the said note: and this Court is of opinion that the length of time from the giving the note to the commencement of the war in 1775, not being sufficient to bar the demand on the said note, according to the said act of assembly, the treaty of peace between Great Britain and the United States of 1783, does not admit of adding the time previous to the war to any time subsequent to the treaty in order to make a bar: and is also of opinion that the agent merely for collecting debts mentioned and described in the said state of facts, is not to be considered as a factor within the meaning of the said act of assembly so as to bring the case within the proviso of the said act."

The same case went again to the Supreme Court, (see 4 Cranch, 164), when, in addition to the facts before stated, it appeared that Andrew Johnston, of the firm of Spiers, Bowman & Co., came to the United States, after the peace of 1783, viz: in the spring of 1784, and died in Virginia in 1785, but that no other partner of the firm had been here since the peace. The Court ordered it to be certified as their opinion, that under all the circumstances stated, the act of limitations of Virginia was not a bar to the plaintiff's demand on the note of the 21st of August, 1773.

As to the doctrine of presumption of payment in actions upon old bonds, see *note* to Murdock & Co. v. Hunter's Rep. Vol. I. *ante*.—[Editor.]

(6) In an action of debt on a promissory note, the court, if requested, ought to instruct the jury, that, twenty years having elapsed between the date of the execution of the note and the institution of the suit, they ought to presume it paid, unless evidence be offered of some acknowledgment of the debt, or of payment of interest,

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like the statute of limitations, on length of time, but is the mere creature of reason, resting on probabilities. The creditor may meet this presumption and rebut it by accounting for the time which has been permitted to elapse, and by showing the improbability that his debt has been paid.

He has, I think, met and completely rebutted it in this case. The bill was protested in England on the 28th day of June, 1776, and Colonel Byrd died in 1777 or 1778. In the meantime, war raged between the two countries; all intercourse between them was unlawful; and Colonel Byrd's circumstances were too much embarrassed to admit of a suspicion that he would be eager in his search for those creditors who could make no legal demand upon him. It is, then, almost certain that this debt was not paid by him in his lifetime.

The chief argument in support of this presumption, is founded on the time which has elapsed since his death, without any demand on his representatives. The plaintiff ascribes this to the insolvency of his estate; but to this it is answered that a suit had been brought in 1803, for a different claim, by the same agent, who was in possession of these bills; a bill was then filed claiming £70 19s. 10d., as a debt due from William Byrd & Co. for dealings at their store in Manchester, and £10 19s. 6½d. a debt due from William Byrd for dealings at their store in

or of part payment of the principal within twenty years. *Wells v. Washington's Admr.*, 6 Munford, 532. But if more than *five years* and less than *twenty years* have elapsed, the defendant cannot rely on the presumption of payment, but he must plead the statute. *Tomlin's Admr. v. How's Admr.*, 1 Gilmer, 1. In the case of *Du Belloix v. Lord Waterpark*, (1 Dowl. & Ryland, 16. 16 Common Law Reports, 12,) decided in 1822, which was an action of assumpsit by the payee against the maker of a promissory note, it was contended that the jury were bound to presume, from analogy to the case of the bond, that after twenty years, the note had been paid, although there was no proof that the payee had been within the realm; but the Chief Justice (Abbott,) held, that the case of a bond was distinguishable from promissory notes and bills of exchange, which were simple contract debts, and were subjected to the provisions of the statute of limitations; whereas, the rule for presuming payment of a bond after twenty years, was founded on the common law, there being no statutable provision with respect to obligations of that nature; and, therefore, without some decisive authority on the point, he could not direct the jury in the way contended for.—[*Editor.*]

Petersburg. If the insolvency of the estate did not prevent this suit, it cannot have prevented a suit on the bills.

The plaintiff assigns two reasons for this suit, by which he attempts to repel the inference which has been drawn from it. One is, that though William Byrd was supposed to be insolvent, William Byrd & Co. were not so. The other, that this suit was only preparatory to an application to the British commissioners, sitting under the treaty of 1802; neither of these reasons is satisfactory; the suit does not seek for satisfaction from the effects of William Byrd & Co.; nor does it even charge that William Byrd was the surviving partner of that company, or even had any of its property in his hands; it charges him merely as a member of the company, and seeks for satisfaction out of his private estate, which is alleged to be in the hands of his executor, or of his trustees. But this reason, were it more consistent with the fact, would not apply to the claim against him as an individual.

To account for this, we are told that it was necessary to establish the debt, in order to justify an application to the British commissioners. But surely it was not less necessary to establish the claim on this bill than on an open account. The production in 1804, or afterwards, of a protested bill without notice to the drawer of its dishonour, or proof of a single attempt to obtain payment of it, could never be received by the commissioners as a valid claim on the British government. But if these bills were held up in order to be laid before the commissioners, why were they not laid before that board? Is not the fact that no application has been made on them to the commissioners, a proof that this is not the cause which prevented the institution of suits on them in this country?

If it be said that they have been laid before the commissioners, I ask what has been the fate of the application? Has it been rejected in consequence of the *laches* of the holder, or has it been successful? But there is no reason to believe that the suit in 1803 was brought with any other view than to recover the money it demanded, and the question recurs—why were

not these bills put in suit also? It has been said they were overlooked by the agent—but this is not credible. There is an indorsement on the envelope which contained them, in his hand writing, and it must be supposed that bonds, bills, and notes were not thrown in confusion among general books and papers, but were carefully preserved and listed, and that they would be immediately inspected by the agent to whom their collection was confided. Must it then be presumed that the agent believed them to be paid?

The reasons against this presumption, so far as respects a payment made by Colonel Byrd, have already been stated. The reasons against their having been paid by his representatives are still stronger. Their accounts are all preserved, and this credit is not claimed. How could the agent have received an impression that they were paid? He must have received it from the papers themselves, from the entries on the books, or from direct communications made by Spiers, Bowman & Co.

But the papers contain no indications of payment. The books, I am told, contain none; and is it reasonable to suppose that the plaintiff would send the bills to be collected, and write to the agent that nothing was due on them? We must impute negligence to the agent, or believe that he was of opinion that the debt was not recoverable at law. The last opinion, however, does not necessarily imply his conviction that it had been paid. The bills were not accompanied with any proof of notice, and he could obtain none. Without this proof, and without any evidence that the drawer had no right to draw, he might have thought the claim desperate; but this does not create a presumption that he believed it to be paid. I think, on a consideration of the circumstances of the case, that the presumption of payment is completely rebutted.

I am next to consider an objection which goes to the right of the plaintiff to sustain this action, even admitting that the right to bring it exists in some person. In 1813 a contract was entered into between the plaintiff and William C. Williams, a citizen of Virginia, by which the former conveyed to the latter



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all his debts in this country, and authorized him to sue for them, either in his own name, or in the name of the present plaintiff. It is contended that these bills passed by this assignment, and that the whole legal and equitable interest being in another, no suit on them can be maintained by the plaintiff.

On the part of the plaintiff it is answered, that this instrument, being made *flagrante bello*, is void, and that no action can be sustained on it, even after peace.

As this may probably become a question between the parties to the instrument, I would not give an opinion on it unless it should be necessary in this cause. I am rather disposed to think it is not necessary.

Bills of exchange are transferable, not by force of any statutes, but by the custom of merchants. Their transfer is regulated by usage, and that usage is founded in convenience. It appears to me that it would be extremely inconvenient to separate the evidence of ownership from the bill itself, and I think there is no usage to justify such a separation. Nothing can be more anti-commercial than the idea of transferring a negotiable paper by a deed transferring a vast number of bills, bonds, notes, and accounts. Such an instrument may very properly be considered as conveying the equitable interest, the right to receive the money, but cannot be considered as a negotiation of the bill upon mercantile principles, or according to mercantile usage, so as to authorize the holder to sue in his own name. The books treat of no such mode of transfer. The person to whom a bill is transferred is never denominated an assignee. He is always termed an indorsee. Upon this ground, I am of opinion, that in this case a suit could not be maintained in the name of William C. Williams. Were this even doubtful, the instrument now relied on contains an authority to sue in the name of the plaintiff, and may, therefore, fairly be considered as not being intended to have the legal effect of an assignment, but to operate as an agreement authorizing William C. Williams to exercise all the powers of ownership in the name of the plaintiff. But I rely on the principle, that a bill of exchange is not, by the custom of

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merchants, transferable by such an instrument as is produced in this case. But the defendant contends, that, admitting the suit to be maintainable in the name of the plaintiff, still William C. Williams ought to be a party, because in a court of equity, all persons concerned in interest must be parties. I do not think the rule applies to such a case as this.

All persons having distinct interests, must undoubtedly be brought into court; but where the interest of one person is involved in that of another, and that other possesses the legal right, so that the interest may be asserted in his name, it is not, I think, always necessary to bring both before the court.

Thus, a trustee may sue, without naming the *cestui que trust* as a party,—an executor or administrator may sue, without naming legatees or distributees. And the obligee in a bond, where it is not by law assignable, may sue, or the equitable assignee may sue in his name, without being named himself as a party. This may, I think, be done in a court of equity as well as a court of law. The person having the equitable interest, if the suit be not really brought for his benefit, may insist on being made a party, and the court will direct it: but I do not think the omission of persons in this situation any objection to the suit.

Had this suit been brought by William C. Williams, Hopkirk must have been made a party; but I do not think Williams a necessary party to a suit brought by and in the name of Hopkirk. I am of opinion that the plaintiff is entitled to a decree for £246 3s. 7d. sterling, with interest thereon, at the rate of ten per cent. per annum, for eighteen months, and with interest on the whole sum at the rate of five per cent. per annum, either from the expiration of eighteen months, or from the time that this claim was asserted in court, according to the manner in which the act in the revival, 1745, which regulates this transaction, has been construed. I shall give the five per cent. only, from the assertion of the demand in court, unless by a reference to the records of the General or District Court, it can be shown that the law has been expounded, to allow interest from the expiration of the eighteen months.

LUCRETIA TEAKLE, Administratrix of SEVERN TEAKLE, deceased, and the said LUCRETIA TEAKLE, RACHAEL TEAKLE, ELIZABETH TEAKLE and SEVERN TEAKLE, heirs and distributees of SEVERN TEAKLE, deceased, v. THOMAS M. BAILEY.

Before HON. JOHN MARSHALL, Chief Justice of the United States.  
HON. SAINT GEORGE TUCKER, District Judge.

In 1807 a contract was entered into between L. T., widow and administratrix of S. T.; and R. T., a daughter of S. T., of Maryland, and T. M. B., of Virginia, whereby L. T., as administratrix of her deceased husband, and as guardian of her infant children, and R. T. in her own right, constituted T. M. B. their agent, and stipulated to convey to him a moiety of certain military lands in the state of Ohio, on certain conditions expressed in the contract. This contract, after reciting the title of S. T., deceased, to these lands, which had not been patented, and the descent of them to his widow and children, proceeds thus: "And whereas a considerable portion of the said land has been sold for the payment of taxes:" "now, therefore, in consideration of the said T. M. B. undertaking to redeem the portion of land so sold for the payment of taxes, or as much thereof as he can redeem, at his own proper expense and trouble; and also obtaining all the necessary title papers to the said 4000 acres, or so much thereof as he can obtain at his own proper cost and trouble, which he doth hereby undertake to do, then, in that case, we, the said L. T. in her own right, and also as guardian of the said E. T. and S. T., jr., and also the said R. T., do agree to convey to the said T. M. B. one half of the said 4000 acres of the said land, or one half of all which shall have been redeemed as being sold, and the half of that unsold." The contract contained a covenant, on the part of L. T. and R. T., that E. T. and S. T., jr., should, when they respectively attained their majority, ratify the agreement and make the necessary conveyances.

In 1812, L. T., R. T., and E. T., the two last being then of full age, conveyed to the agent one moiety of these 4000 acres of land which belonged to the heirs of S. T., deceased. The effect of this conveyance was, to execute the contract of 1807, not only as to themselves, but as far as respected the interest of S. T., then a minor.

The parties filed their bill to set aside the contract of 1807, and also the deeds of 1812 in execution thereof, on the ground that the contract was entered into, and the deeds were executed, through mistake and ignorance on the part of the plaintiff, and misrepresentation and concealment on the part of T. M. B. On the trial it was fully proved that R. T. was a minor when the contract of 1807 was entered into. The Court *Held*:

1. That with respect to the contract of 1807, that being the commencement of the defendant's agency, the *onus probandi* was upon the plaintiffs to show the alleged

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- misrepresentation and concealment, and without such proof adduced by them, the Court could not interpose its authority to set aside the contract.
2. That the effect of that contract was to bind the widow according to its terms, i. e., to the extent of her dower-right, and the infants to the extent of the equity it gave for a liberal remuneration for services performed.
  3. But the question arising under the deeds of 1812, was a different one. So far as they could be considered a mere confirmation of the contract of 1807, which had been made for them by their mother, to the extent above expressed, they are binding upon R. T. and E. T., though not upon their infant brother. But so much of the contract of 1812 as bound them farther than that of 1807, was not the confirmation of an old, but the execution of an original contract. The principles of equity, do not absolutely annul such a contract (entered into between an agent and his principals), but they subject it to a searching and rigorous examination. They require the agent to show that he withheld no information which his agency enabled him to acquire, that his communications to his principals were full, as well as fair. If he cannot do this, the contract must be set aside.

THE case is fully stated in the following opinion of the Court, delivered by

MARSHALL, C. J.—This bill is brought by Lucretia Teakle, widow and administratrix of Severn Teakle, deceased, and by her children, to set aside a contract made on the 2d of August, 1807, by the said Lucretia, as the administratrix of her deceased husband, and as guardian of her infant children, and by her eldest daughter, Rachael Teakle, with the defendant, stipulating to convey to him a moiety of certain lands in the state of Ohio; and also to set aside certain deeds dated 16th of April, 1812, executed by the said Lucretia and Rachael, and also by Elizabeth Teakle, purporting to convey a moiety of those lands.

Thomas M. Bailey, the defendant, being in the state of Ohio in the summer of 1807, for the purpose of locating military land-warrants which he had previously acquired, was informed by the auditor of the state that four thousand acres of military lands belonging to Severn Teakle, a captain in the army of the United States, had been located in Ohio, and that a considerable portion of them had been sold for non-payment of taxes, and that

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parts of them would continue to be annually sold, unless measures should be taken for the payment of future taxes as they should accrue. By the laws of Ohio, the lands of minors sold for non-payment of taxes, were redeemable within twelve months after such minor should have attained his age of twenty-one years, by payment of the purchase-money, with interest, and by paying also for any improvement which the purchaser might have made on the premises. Redemption was so much a thing of course, that the purchasers usually gave up the land on being satisfied of the fact of minority; and if the establishment of that fact in court were required, this was done without formal proceedings, and at a very inconsiderable expense. The only real difficulty lay in the adjustment of the claim for improvements, where such claim was made.

On his return from the state of Ohio, Mr. Bailey called on Mrs. Teakle, then residing at Easton, a small village on the eastern shore of Maryland, and communicated to her the situation of the lands of the family, on which the contract of the 2d of August, 1807, was entered into.

Mr. Bailey proceeded to effect the redemption of the lands which had been sold for non-payment of taxes.

Not long after this contract, the defendant, by looking into the Acts of the Virginia Assembly concerning land-bounties to the officers of the Virginia line, discovered that Captain Teakle, having served until the end of the war, was entitled to the additional quantity of twelve hundred and twenty-one acres. He communicated this fact to Mrs. Teakle, and drew the warrant, under a power of attorney made by her. Under a contract with Mrs. Teakle, this warrant was located by Bailey's agent, and the title obtained, for which service Bailey receives a moiety of this tract also.

In April, 1812, Rachael and Elizabeth having then attained their age of twenty-one years, deeds were executed by Lucretia, Rachael, and Elizabeth, purporting to convey a moiety of the four thousand acres of land to the defendant.

Elizabeth afterwards intermarried with — Swann, and

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Severn Teakle has attained his age of twenty-one years. He refuses to assent to these contracts, and this bill is brought to set them aside, as having been obtained by misrepresentation and concealment, from persons entirely ignorant of the property they sold, and of the situation in which it was placed.

The contract of the 2d of August, 1807, will be first considered. This paper, after reciting the title of Severn Teakle to four thousand acres of military land which had not been patented, and the descent of said land to his widow and children, proceeds thus: "And whereas a considerable portion of the said land has been sold for the payment of taxes:" "now therefore, in consideration of the said Thomas M. Bailey undertaking to redeem the portion of land so sold for the payment of taxes, or as much thereof as he can redeem, at his own proper expense and trouble; and also obtaining all the necessary title papers to the said four thousand acres, or so much thereof as he can obtain, at his own proper cost and trouble, which he doth hereby undertake to do, then, in that case, we, the said Lucretia Teakle in her own right, and also as guardian of the said Elizabeth and Severn Teakle, and also the said Rachael Teakle, do agree to convey to the said Thomas M. Bailey one half of the said four thousand acres of the said land, or one half of all which shall have been redeemed as being sold, and the half of that unsold." The agreement then contains a covenant on the part of Lucretia and Rachael Teakle, that Elizabeth and Severn Teakle shall, when they respectively attain their ages of twenty-one years, ratify this agreement, and make the necessary conveyances.

The bill charges that the contract, and the deeds which grew out of it, originated in mistake and ignorance on the part of the complainants, and in fraud, imposition, and misrepresentation and concealment on the part of the said Bailey. They were ignorant, the bill states, of the value of the land, and of the means to be employed for its redemption, and were unable, from their narrow circumstances and situation, to make the inquiry. The said Bailey represented the land as poor, and the

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difficulties of redemption as considerable, and believing him to be their friend, they trusted to his representation. He knew the value of the land, and knew that the law of Ohio rendered redemption easy.

The communications made by Mr. Bailey were entirely verbal, and no person, not of the family, appears to have been present at the time. The proof of his misrepresentation or concealment can come only from the parties themselves.

In his answer, Mr. Bailey states the communication to him by the auditor of the state of Ohio, relative to Captain Teakle's lands, and adds, that he communicated all the information he possessed to Mrs. Teakle.

The counsel for the plaintiffs rely upon the representation made in his answer of the auditor's communications, as being a representation of his own communications to Mrs. Teakle, and contend that they amount to a misrepresentation. The fact supposed to be misrepresented, is the quantity of land sold for non-payment of taxes. Mr. Bailey, in his answer, represents the auditor to have said, that more than half had been sold; whereas, in truth, not quite half had been sold. Of the four thousand acres, between nineteen hundred and two thousand acres had been actually sold.

The answer does not aver in terms, that he gave to Mrs. Teakle the precise detail of circumstances which he says was made to him by the auditor; and if he had, we do not think that a mistake less than one hundred acres in the quantity of land actually sold, would have made any difference in the course which Mrs. Teakle would have pursued, and ought in prudence to have pursued, under the circumstances in which she found herself and her family placed. Great part of the land was certainly sold, and the rest would certainly share the same fate, unless some persons were employed for its preservation. And the precise quantity actually sold had no influence on her conduct, as is shown by the fact that she gave as much for saving the unsold land, as she gave for the redemption of that which had been sold. It is also a circumstance of some weight, that

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the bill does not suggest any misrepresentation in this particular, and that the language of the contract is, that "a considerable portion," not that more than one-half "of the said land had been sold."

The bill also charges a great misrepresentation in the value of the land; but of this there is no proof. Indeed it does not appear, nor is there any reason to believe, that Bailey had, in August, 1807, acquired any accurate knowledge of its value, nor is it alleged, nor is there reason to believe, that, at that time, he made any representation respecting it.

A point of more consequence is the representation he made respecting the facility of redemption. When we compare the description of the difficulties attending redemption, detailed in his answer, with the statement of those difficulties made by lawyers in Ohio, whose depositions have been taken, or with those actually encountered, we must say that it is highly coloured; that it is calculated to magnify those difficulties; but we cannot say that they are positively untrue. The account of the value of improvements was certainly exposed to the hazard which he stated.

The most important inquiry in this part of the case is, did Mr. Bailey communicate to Mrs. Teakle the legal right of the children to redeem within a limited time, after attaining their ages of twenty-one years, the lands which might before that time be sold for non-payment of taxes: or did he leave her to suppose that it was an affair to be arranged with the purchasers?

Mr. Bailey's answer must be understood as averring that he did give her this information, because he admits that he possessed it, and avers that he gave all the information he possessed. On this point, too, the answer is to be considered as responsive to the bill and as testimony in the cause. There are certainly some expressions in the contract which are calculated to attract notice, though they may not be sufficient to counter-vail the answer. The language of that instrument is, that Lucretia and Rachael Teakle undertake to convey a moiety of the land, "in consideration of the said Thomas M. Bailey



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undertaking to redeem the portion of land sold for the payment of taxes, or *as much thereof as he can redeem.*" These expressions certainly do not imply an absolute legal right to redeem the whole, and were not to be looked for in an instrument prepared with a knowledge of such absolute legal right. The same language is observable in that part of the instrument which stipulates for the conveyance from Lucretia and Rachael Teakle; they "agree to convey to the said Thomas M. Bailey, one half of the said four thousand acres of the said land, or one *half of all which shall have been redeemed as being sold, and the half of that unsold.*" These latter words would be unnecessary, if no doubt existed respecting the redemption of the whole land; for all the land sold, and all the land unsold, must, certainly, be equal to all the land. This last member of the sentence, then, would seem to indicate some apprehension in the minds of the contracting parties, that some part of the land sold might not be redeemed—an apprehension not very consistent with a legal right to redeem the whole; yet these expressions may originate in the superabundant caution of the writer of the contract, and are not thought sufficient to outweigh the answer.

The counsel for the plaintiffs contend, that Bailey is to be considered as the agent of Mrs. Teakle and the family, before this agreement was made; and that, instead of requiring proof of misrepresentation or concealment from her, he must show that his own conduct was perfectly fair. This fact, it is contended, shifts the *onus probandi* from her to him, and in proof of the fact, they rely on a letter from Bailey to his agent, of the 28th of April, 1807.

The Court cannot understand the letter otherwise than as asserting this agency; but, notwithstanding the declaration it contains, we must consider the agency as commencing with the contract of August, 1807; there is no allegation in the bill which asserts a prior agency; consequently, that part is not put in issue. This is not all; such prior agency would be inconsistent with the whole case, as made out by the plaintiffs, and with all the other testimony in the cause. John Edmondson

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speaks, in his deposition, of a letter from John Teakle to the plaintiff Lucretia, recommending the defendant to her as a person capable of giving her information, and of transacting her business. The date of this letter, as well as its contents, might throw some light on a part of this case; but it is not produced, and, consequently, can have no influence on it.

The defendant being entirely free to contract with Lucretia, one of the plaintiffs, on the 2d of August, 1807, the misrepresentation and concealment alleged, in order to set aside that contract, must be proved by the plaintiffs, or the Court cannot interpose its authority for that purpose. We do not think either has been proved.

The contract of August, 1807, then, is to be considered as remaining in force until cancelled by the parties, and the Court will proceed to examine the extent of its obligation.

The contract was made with this defendant by Lucretia Teakle, the widow and administratrix of Severn Teakle, deceased, and guardian of his children, and by Rachael Teakle, one of his daughters. The contract of Lucretia could not bind the land beyond her dower right; the contract of Rachael might bind her third part, if she was of age when it was executed, not otherwise. That she was an infant at that time, is proved satisfactorily, not only by the affidavit of the mother, to which no objection has been made, but by the deposition of her brother, John Edmondson; he produces a book, proved to be in the handwriting of Severn Teakle, in which he has, in his own handwriting, inserted the age of his wife, the time of their intermarriage, and of the birth of each of their children. The deponent further swears, that to his own knowledge, the age of Severn, the youngest, is truly stated in the book.

It is then sufficiently proved that Rachael was an infant when she executed the contract of August, 1807, and her lands could not be bound by it.

That contract, then, unaided by subsequent transactions, would give the defendant recourse against Mrs. Teakle in the event of its non-performance, but would give him no interest in

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the lands themselves. Those subsequent transactions, therefore, must be considered.

The Court will pass over the purchase made by the defendant in 1809, because the deeds were cancelled at the request of the plaintiffs, and proceed to the contract or deeds of April, 1812. By deeds of that date, Rachael and Elizabeth Teakle, who were then of full age, convey to the defendant one moiety of the four thousand acres of land in the state of Ohio, to which the heirs of Severn Teakle were entitled. The effect of this conveyance is, to execute the contract of 1807, not only so far as respected themselves, but so far as respected the interest of their brother, then a minor.

The plaintiffs make the same objection to this instrument, as being obtained by misrepresentation and concealment from persons ignorant of their rights, as were made to the agreement of 1807, and contend that the objection derives additional strength from the fact, that the contract was made with an agent.

That an agent to sell cannot be himself the purchaser, under the power to sell, is well settled. Such a purchase is absolutely void.(1) The principle, however, of those decisions does not

(1) Sugden's Law of Vendors, 391-405. In Yandey v. Hopkins, 1 Munf. 419, Judge Roane, in commenting on this rule, said, that the inhibition seemed to arise from the *confidence* placed in, and the *intimate knowledge acquired by*, trustees, auctioneers, &c., which would enable them, if permitted to purchase, to avail themselves of facts coming to their knowledge in their several characters, and by withholding them from others, to lessen the prices of the articles exposed to sale, to their own emolument. But it had not been shown by any adjudged case, that the inhibition had been extended in England to sheriffs or collectors, and he thought that the reason of the rule did not extend to a purchase by a sheriff at his own sale, if it was *bona fide*. He was for sustaining such a sale. The majority of the court, however, affirmed the decree setting aside the sale, but on the ground that the authority given to the sheriff had not been *strictly pursued*. In Carter, &c. v. Harris, 4 Rand, 199, Judge Carr stated it as his *impression*, that a sheriff selling property under an execution could not legally buy of himself. The characters of buyer and seller were incompatible, and could not safely be exercised by the same person. But in that case, also, the sale was set aside on *other grounds*. Whether a purchase by a trustee, at his own sale, is void *per se*, has never been directly decided in Virginia. In Quarles v. Lacy, 4 Munf., 251, where one trustee purchased the trust property for the benefit of both, the sale was set aside; but in that case the

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apply to a contract between an agent and his employer. Such contracts are not void *per se*, but are watched with no inconsiderable jealousy by courts of equity. In general, the information of the principal may be supposed to be derived through the agent, who must also be supposed to possess his confidence. In such a case, it is certainly desirable that the circumstances at-

price was grossly inadequate, and the court, in setting forth the grounds of their opinion, rely strongly upon circumstances, (which are detailed), tending to produce a great sacrifice of the property: besides that in that case, the trustees did not proceed in strict conformity with the decree under which they acted. As to *executors*, a purchase by them at their own sale, it seems, is valid, if the exigencies of the estate shall render the sale necessary, and it be fairly conducted. *Anderson, &c. v. Fox, &c.*, 2 H. & Munf., 245. *M'Key*, executor of *Fuqua v. Young*, 4 H. & Munf., 430. In the latter case, Chancellor Taylor said, that in Virginia it was universally understood that such sales were valid, and that there was "nothing more common than for an executor to be a purchaser at his own sale of his testator's estate, and most commonly for the advantage of the legatees."

This subject is examined by Judge H. St. G. Tucker, (now president of the Court of Appeals of Virginia), in a recent and valuable work. 2 Tucker's Com., 450-453, title Trusts. He lays down the general proposition, that trustees, executors, agents, commissioners of sales, sheriffs, and auctioneers, are incapable of purchasing at sales made by themselves, or under their authority or direction; and does not deem the *dicta* found in the Virginia reports, which seem to incline against the universal denial of the validity of purchases by persons in fiduciary characters, of the trust subject, sufficient to shake the well-settled principles quoted from the decisions of the English courts, and of Chancellor Kent, in *Davoue v. Fanning and wife*, 2 Johns. Ch. Rep., 252. But *quære*, if the case of *executors* (or administrators) may not be considered an exception to the universality of this rule in Virginia, if it be shown that the sale *was necessary for the payment of debts*, and was perfectly fair? In such a case it would be a grave question, how far the general understanding of the people of this state, that such purchases are valid, and the very general practice, too, under it, would be entitled to consideration, as controlling the general rule. In *Anderson, &c. v. Fox, &c.*, cited above, Judge Tucker (the elder) said, that this practice had been too general, and had prevailed too long in this country to be now drawn in question by analogy to the doctrines in England, concerning trustees of lands or commissioners of bankrupt: that though executors and administrators were, *to many purposes*, considered as trustees in a court of equity, they were not so in *all cases*. And although Judge Roane, in the same case, said, that the decision of the question was not necessary, yet the decree directed an account, and if on such account it appeared that the sale of the slave *was necessary for the payment of debts*, the purchase by the administrator should be confirmed.—[Editor.]

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tending the transaction should be so clearly stated, as to leave no doubt that the principal entered into the agreement with full knowledge of them, or at least of such of them as were essential to the contract into which he had entered. Whether the whole burden of proof be shifted to the agent or not, it may be stated with some confidence, that circumstances which are merely suspicious, and which would be insufficient to affect a contract between persons unconnected with each other, would be allowed great weight in a case between a principal and agent. The case under consideration is one in which proof that the communications to the principal had been full, is peculiarly desirable. The principals resided in the state of Maryland, and were young ladies who had not very long attained the age of twenty-one. The business to which the agency related was transacted in the state of Ohio, and the record furnishes no evidence of their possessing any other knowledge respecting it than was derived from their agent. Were the deeds of April, 1812, then, an original contract, there would be much weight on the argument, which insists on proof from the defendant that his communications to the plaintiffs were full, as well as fair.

But those deeds do not constitute an original contract. They amount, in part, at least, to a confirmation of a contract made for them in their infancy by their guardian. So far as Rachael and Elizabeth convey a moiety of their several interests in the lands, they only confirm the contract made for them by their mother, to which Rachael, while an infant, was a party. That contract, as has been already observed, must be allowed to stand, and is obligatory on the mother, according to its terms, and on the infants, to the extent of the equity it gives for a liberal remuneration for services performed. Being thus far obligatory, the subsequent contract, and so far as it is a mere confirmation of a contract unexceptionable in its origin, made by one of the infants in conjunction with her guardian, cannot, we think, be set aside.

But so much of the contract of April, 1812, as binds Rachael and Elizabeth farther than that of August, 1807, was intended

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to bind them, is not a confirmation of the former contract, but is an original contract, and is unquestionably, in all its parts, made with a person who was at the time an agent, and is subject to all the rules which a court of equity applies to purchases made by the agent with his principal. It has been already said, that these rules do not positively annul such a contract, but do subject it to a rigorous and suspicious examination. This principle is, we think, to be collected from all the cases which have been cited, or which are to be found in the books.

In 6 Ves. 626, *ex parte* Lacy, the court said, that a trustee may purchase from *cestui que trust*. The *cestui que trust* may, by a new contract, dismiss him from that character; but the act must be watched with infinite and most guarded jealousy.

In 8 Ves. 337, *ex parte* James, the court said that an assignee under a commission of bankruptcy cannot purchase, unless he shakes himself altogether out of the trust, and not then, without a little more than parting with the character. It is the duty of a trustee to acquire all the knowledge he can obtain for the benefit of *cestui que trust*; and no court can discuss what knowledge he has acquired, and whether he has fairly given the benefit of that knowledge to the *cestui que trust*. In this case, the court refused to let James, who had been the solicitor to the commission of bankruptcy, lay down his solicitorship, and become a purchaser. Although a distinction may be taken between the character of the agency in the case *ex parte* James, and that of Mr. Bailey, yet, the principles laid down in that case apply, to a considerable extent, to all agencies in which the agent may be supposed to acquire information in consequence of his agency, which is not in possession of his principal.

In 9 Ves. 234, *Coles v. Trecothick*, an agreement was entered into to convey lands to trustees to be sold for the payment of debts, but the deed was not executed, and the *cestui que trust*, acted for himself. The trustee purchased a part of the trust property, for his father, from the *cestui que trust*, who, being offered some time afterwards, a much more considerable price for the land, refused to convey, and this suit was brought by the

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purchaser for a specific performance. There were many circumstances in favour of the purchaser, and a specific performance was decreed; but, in speaking of purchases made by a trustee from *cestui que trust*, the chancellor said: "But, though permitted, it is a transaction of great delicacy, and which the court will watch with the utmost diligence, so much, that it is very hazardous for a trustee to engage in such a transaction."

In *Morse v. Royal*, 12 Ves. 355, the counsel for the trustee purchaser admitted the law to be, "that it is incumbent on the trustee, if the suit be instituted during his life, to prove that the *cestui que trust* knew, not only that he was selling to his trustee, but also what he was selling, and that he had all the information the trustee could give him." The same doctrine was laid down with great strength by the opposite counsel, and although the court does not in terms assent to it, there is no reason to believe that the doctrine was not entirely familiar.

In *Lowther v. Lowther*, 13 Ves. 95, the lord chancellor states the principle to have been laid down to this effect by Lord Eldon, in *Coles v. Trecothick*: That an agent to sell shall not convert himself into a purchaser, unless he can make it perfectly clear that he furnishes his employer with all the information that he himself possessed.

There is much good sense and moral justice in this rule, and it imposes no hardship on the agent. He may make his contracts in the presence of witnesses, who may depose to the extent of his verbal communications: or their extent may be shown by written testimony, either in his correspondence, or the contract itself: or it may be inferred from the relative situation of the parties, and of the subject of the contract, that every material fact was known to the principal. The case under consideration, furnishes no circumstance to enable the Court to infer, that the principal possessed all the knowledge which had probably been acquired by the agent. The facts of the case justify the belief, that he had received accurate information of the value of the property for which the contract was made. They do not authorize the opinion that Lucretia Teakle, or her children, possessed any other information than was derived from him, nor

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that he had communicated to them all that he had acquired which was material to the contract. Our knowledge of Mr. Bailey might satisfy us, as individuals, that he had done all which the strictest morality would require, but courts of equity must be guided by the testimony in the record, not by the good or bad opinion of individuals.

In this case, then, we see a contract made for an infant brother, by young ladies who had recently attained their ages of twenty-one years, with an agent, who had been employed for them during their infancy, in such transactions as gave him full knowledge of the value of the property which constituted the subject of the contract, and which had also constituted the subject of his agency. We perceive no evidence, that he communicated this information to them, or that they had derived it from any other source; nor was their situation in relation to the property such as to justify the inference that they could be possessed of it. Under these circumstances, we cannot think that the contract, so far as it was original, ought to stand against Rachael and Elizabeth, since their brother Severn, who has now attained his full age, refuses to affirm it.

But, although the contract of 1812 must be set aside, as to the moiety of Severn Teakle's third part of the land, the defendant Bailey, is unquestionably entitled to claim from him his third of the expenses incurred, and of the pecuniary compensation to which he would have been entitled for the services rendered. The advances of money constitute a proper subject for an account. The compensation which Mr. Bailey may claim, may be referred to a jury, unless the parties can adjust it themselves, or prefer a reference to a commissioner.(2)

(2) In addition to the cases cited by the chief justice, from Vesey, see the following cases, on the question of the extent of the validity of contracts between principal and agent:—Butler et al. v. Haskell, 4 Desausure, 651, and the cases cited by Desausure, J., in his opinion. Davoue v. Fanning and wife, 2 Johns. Ch. Rep. 252. This question was examined very elaborately, in both of those cases, and in each of them the contract was annulled. See also Wormley v. Wormley et al. [8 Wheat. 421; 5 Cond. Rep. Sup. Ct. U. S. 473], cited in a note to the same case, ante.—[Editor.]



# **Circuit Court of the United States.**

**VIRGINIA, NOVEMBER TERM, 1822.**

**BEFORE**

**HON. JOHN MARSHALL, Chief Justice of the United States.**

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## **SCOTT AND LYLE V. LENOX.**

**An action of waste is not maintainable against a tenant by elegit, either upon the principles of the common law, or under the statute law of Virginia.**

**THIS** was an action brought by James B. Scott and James Lyle, trustees for Scott, Irvine & Co., against Samuel Lenox, surviving partner of Heron, Lenox & Co., subjects of the king of Great Britain, to recover damages for waste alleged to have been committed on fourteen half-acre lots in the town of Manchester, and state of Virginia, which lots were held by Samuel Lenox, surviving partner as aforesaid, as tenant by elegit.

On the 9th day of June, 1818, a decree was rendered by the Circuit Court of the United States for this district, in favour of Heron, Lenox & Co., against Archibald Freeland, for the sum of \$3672 55, with interest thereon at the rate of five per cent. per annum from the first day of May, 1798, till paid. This de-

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cree was subsequently enjoined, and on the 12th day of June, 1820, the injunction was perpetuated as to \$ 622 48, part thereof, and was dissolved as to the residue; and on the 13th day of July following, Samuel Lenox, surviving partner, as aforesaid, of Heron, Lenox & Co., sued out a writ of elegit, by virtue of which the Manchester property above mentioned was extended and appraised, and a moiety of it delivered to Samuel Lenox, until he should have levied thereof the sum of money, and interest, for which the last decree was rendered, at the annual rent of \$535 04, which was declared to be a reasonable annual rent by the inquisition taken in obedience to the said writ of elegit.

During the pendency of the injunction referred to, to wit: on the 29th of October, 1819, the said Archibald Freeland conveyed to Scott and Lyle, the plaintiffs, the Manchester property aforesaid, in trust to secure a debt due to Scott, Irvine & Co., amounting to \$8000, which deed was duly recorded in the clerk's office of Chesterfield county on the 30th of December following.

On the 15th day of May, 1822, the plaintiffs sued out a writ of waste against Samuel Lenox, returnable on the 22d day of the same month, requiring him "to show why, when, by the laws of the Commonwealth of Virginia, it is provided that it be not lawful for any one to make waste, sale, or destruction in lands, houses, woods, or orchards, to them demised *for life or years, &c.*" the said Samuel Lenox in divers lands and houses, with their appurtenances, &c., in the town of Manchester, county of Chesterfield, and state of Virginia, whereof the said James B. Scott and James Lyle, for the benefit of the said Scott, Irvine & Co., and of the said Archibald Freeland, are tenants of the fee, and the said Samuel Lenox, surviving partner aforesaid is tenant of the *freehold*, by virtue of an extent and delivery thereof to him, in pursuance of a writ of elegit, &c., committed waste, &c. &c." This writ was not executed, and an *alias* was issued, returnable to the August rules, which was executed on the tenant in possession of the improved lots,

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and copies of it were posted at the doors of the unoccupied tenements.

The defendant, by his counsel, cravedoyer of the writ, and the return thereon, of the decree in the suits of *Lenox v. Freeland* and *Freeland v. Lenox*, of the *elegit* and inquisition returned thereon, of the deed of trust referred to above, which being read, he demurred generally to the plaintiff's declaration.

On the 26th of December, 1822, MARSHALL, C. J. delivered the following opinion:

This is a demurrer to a declaration in an action of waste; and the only question is, can the action be maintained against a tenant by *elegit*?

Could the Court be guided solely by considerations of the reason and policy of the law, the argument of the counsel for the plaintiffs would certainly have great weight; but it is a case of strict authority, and by authority my opinion will be regulated.

The Register contains the form of a writ of waste against a tenant by *elegit*, and the Register is admitted to be a book entitled to great respect. Its authority on this particular point is, however, in some degree diminished, by the circumstance that the editor has placed this note in the margin: "*Quære*, If it be maintainable by the law against him?" Fitzherbert, in his *Natura Brevium*, says that this writ is in the Register, and that it stands with reason that this action should lie, but adds, that some say the debtor shall not have this action, because he may have account.(1)

(1) "And there is a writ of waste in the Register for him in the reversion against tenant by *elegit*, who hath lands and tenements in execution for debt or damages; and so against tenant by *elegit*, who hath lands in execution by recognition of debt: and also against his executor who hath lands in execution by *elegit*; and it seemeth to stand with good reason that the action doth lie.

"But some say that he against whom the execution is sued, shall not have an action of waste, because he may have a writ of *venire facias ad computandum*,

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The plaintiff also relies on a case reported in the year books, and decided 21 Edw. III.; that was a *scire facias* sued out by the person whose lands had been delivered on a recognizance, praying that the tenant might receive the money due, and restore the land. He also suggested that the tenant had cut trees growing in a wood delivered to him, and prayed for a writ to compel him to answer for the cutting aforesaid; the writ was granted.

The counsel for the plaintiff assumes that this was a writ of waste; but the case does not say so; nor does it furnish any thing that will justify this inference. A writ to compel a tenant to answer for cutting trees, is not necessarily a writ of waste. The writ was awarded, but I do not find any decision of the cause; a similar case came on at Trinity term the same year, where the judges said it would be advisable for the plaintiff to strike the cutting of the trees out of the suit, as he might bring trespass on the case for that injury. The writ in the Register, then, and the opinion of Fitzherbert, are the only authorities in support of the action.

*§c.*, and there the waste shall be recovered in the debt; but by the action of waste he shall recover treble damages, and so it seemeth he shall not do by that writ of *venire facias ad computandum*."—Fitzherbert's *Natura Brevium*, 134; tit. *Writ of Waste*.

Sir Matthew Hale, in his commentary upon the passages from Fitzherbert above quoted, says: "A *scire facias* was against a tenant by *elegit*, who had cut trees, to pay the residue of the money, to answer for the trees cut, and for the plaintiff to have his lands again. *Curia*. By the statute against cutting trees, this is a nature of trespass, and lies not in account. *Nor is he punishable by this writ, (of waste,) but in an action on the case only.*"—21 E. III., 26.

Again, Fitzherbert says, "and also if a man hath lands in execution by *elegit*, and afterwards be in the reversion granteth the reversion to a stranger in fee, that the grantee shall have an action of waste against the tenant by *elegit*, seems reasonable, because the waste is to his disinherittance, and he ought not to satisfy the debt due by the grantor."

"And see 21 E. III. in title *Scire Facias*, whether recognizor had *scire facias* upon his surmise that the recognizee had levied all the debt by cutting of trees."—*Ib.*

Sir Matthew Hale says: "Note, he cannot in a *scire facias* compel him to answer to the waste and cutting of the trees, and therefore it was waived." 21 E. III., 306. See F. N. B., 104, noted that waste lies. *Quære.*—[Editor.]

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In support of the demurrer, the counsel for the defendant has cited 1 Inst., 54, *a*, where Lord Coke says, "no action of waste lieth against a guardian in *socage*, but an account or trespass; nor against a tenant by *statute staple*, &c., or *elegit*." (1 Co. Litt. 54, *a*.)

It is unnecessary to speak of the high respect which is due to the opinions of My Lord Coke, especially on subjects of this sort. He was particularly conversant in all the ancient decisions, and was well acquainted with the writs in the Register, with their reason, and with the authority on which they were founded. He understood, too, all the ancient opinions and doctrines on this subject.

In the Dean and Chapter of Worcester's case, 6 Co. 37,(2) it was contended at the bar, that the lease was void under the statute of the 13 Eliz. ch. 10, "because it was made for the life of others, in which case it might happen that there might be an occupant who would not be subject to waste, no more than tenant by *statute merchant*, or *tenant by elegit*, &c." It was admitted by the court, that the Dean and Chapter are restrained to make leases dispunishable of waste, but it was resolved that an occupant is punishable for waste, because he has the estate of the lessee for life, and is therefore within the statute of Gloucester; "but tenant by *statute merchant*, *statute staple*, or *elegit*, do not hold for life or years, and therefore they are not of the statute."

Two objections have been made to the authority of this case. 1. The question was not a point in the case, and the opinion, therefore, is a mere *obiter dictum*. 2. This dictum goes no farther than to deny that the action is given by the statute of Gloucester.

To the first objection, I answer, that although the opinion expressed by a court on a principle stated in argument, as analagous to that contended for in the cause, be not of equal authority with a decision on the very point in issue, yet, in such a case as this, it is of great weight.

It was the usage of the court, in the time of Lord Coke, to decide the collateral points of law which were stated in argument, and considered by the judges as bearing on the main question. Those points were argued, and deliberately considered and settled. In this case, it was contended at the bar, that an occupant was not punishable for wastes, no more than a tenant by *elegit*. The court resolved that an occupant was punishable for waste, which was the very point in controversy, though a tenant by *elegit* was not, and took the distinction between the two tenants. Certainly when a principle is stated at the bar as acknowledged law, and is declared by the court to be law, it deserves great respect, though it may not have all the authority of an express decision on the very point in issue.

2. To the second objection, it is to be observed, that the proposition made at the bar was general, that the action was not maintainable. Of course it was not maintainable either at the common law or by statute. The court assents to this proposition, and gives as a reason, that it is not within the statute. The inference is, that by the admission of all, it was not maintainable at common law; and to show the truth of the general proposition that the action could not be sustained, it was necessary to state only that it was not given by statute.

In 2 Inst. f. 299, Lord Coke says: "At the common law, waste was punishable in three persons, viz.; tenant in dower, tenant by the curtesy, and the guardian." (2d part Coke's Inst., vol. iv. f. 299.—*Ed.*)

It is argued, that although tenant by *elegit* is not comprehended in this enumeration, Lord Coke is not to be understood as denying that the action might be maintained independent of any statute, because the estate did not exist at common law, but was created by statute. When created, it is contended, the principles of the common law give the action, because the estate is created by act of law, and not by the act of the party.

This argument is not without its weight; but it is opposed by other reasons, which seem to me to be entitled to greater consideration. When we consider the fullness with which Lord

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Coke discusses every question on which he treats, we cannot resist the conviction that, had he supposed that the action was maintainable on the principles of the common law, he would have said so, and not have left the student to draw the very strong inference against the action which his words justify. But his opinion on this point is expressly declared in his 1st Inst., in the passage already cited.

If this action cannot be maintained at the common law, it depends entirely on an act of assembly.(3) That act seems to have been intended to comprehend the whole subject, since it enumerates the persons against whom the action lay at common law. If a tenant by *elegit* be comprehended in this act, it must be under the words "tenant for years." It has been contended at the bar, that a tenant by *elegit* is a tenant for years, because that is certain which may be rendered certain, and when the land is delivered to him at a certain annual rent, to be held till it discharges a certain sum, he is tenant for a certain number of years, which may be computed with exactness.

Were this a case of the first impression, I should incline strongly to this opinion. I do not clearly perceive the distinction between the tenant who holds lands at ten dollars per acre, until he shall receive one hundred dollars, and a lease for ten years, if J. S. shall so long live. The tenancy by *elegit* is determinable within the time by the payment of the money, and the estate for ten years is determinable within the time by the death of J. S. But the question is as completely settled as a question of law can be settled by authority. Lord Coke, in his commentary on the statute of Gloucester, says, that tenant by *elegit* is not within it, because he is not a tenant for years. All the books concur in this opinion. There is not, I believe, a dictum against it.

I think the demurrer must be sustained.

(3) Act of Dec. 26, 1792. 1 R. C. of 1819, ch. 117, p. 462.—[Editor.]

## THE UNITED STATES v. NELSON and MYERS.

Before Hon. JOHN MARSHALL, Chief Justice of the United States.

A. and B. consented to become sureties in an official bond. A printed paper in the usual form prepared for official bonds was signed by them. At the time that A. and B. signed it, all those parts which are usually written, including the penalty, the names of the obligors, &c., were blank; and C., the principal, had not yet signed it. A. and B. signed it with a perfect knowledge of the purpose for which it was designed, but the blanks were afterwards filled up in their absence, and without any *express* authority from the sureties, and the bond so executed was accepted by the proper authorities of the United States, as the official bond of C., with A. and B. as his sureties. *Held*: That such bond is not obligatory on A. and B.

DEBT for \$7000 against Thomas Nelson and Samuel Myers, surviving obligors of John Archer, Thomas Nelson, and Samuel Myers. This action was founded on an instrument purporting to be an official bond executed by the above parties in the penalty of \$7000, the condition whereof was, that the said Archer should faithfully discharge the duties of paymaster of the twentieth regiment of infantry, of the army of the United States. The declaration assigned various breaches of the condition of the bond, and the defendants pleaded severally a special *non est factum*. The jury found a special verdict presenting the following state of facts, viz: That John Archer, the deceased co-obligor of the defendants, was, previous to the date of the paper writing in the declaration mentioned, appointed paymaster, &c., and, as such, was by the law of the United States bound to give such bond and security as the bond in this case purported to be: that the said paper writing, purporting, &c., was signed, sealed, and delivered, by the defendants as their act and deed, and when it was so signed, sealed, and delivered, none of the manuscript parts (the formal parts of the bond being printed) were written. (The bond, with the manuscript parts aforesaid in italics, is in the words and figures following, viz:)



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"Know all men by these presents, that we, *John Archer, lieutenant in, and paymaster of the twentieth regiment of infantry in the army of the U. S. of North America, Thomas Nelson and Samuel Myers*, are holden, and stand firmly bound and obliged unto the United States of North America, &c. in the penal sum of *seven* thousand dollars current money, &c. well and truly to be paid, &c. for which payment faithfully to be made and done we the said *John Archer, Thomas Nelson, and Samuel Myers*, do bind ourselves, &c. Signed with our hands, and sealed with our seals, this *first* day of *September*, in the year one thousand eight hundred and *twelve*.

"The condition, however, of the above obligation is such, that whereas the above bounden *John Archer*, is appointed *paymaster of the twentieth regiment of infantry* of the army of the United States aforesaid: Now, if the said *John Archer* shall well and truly execute, and faithfully discharge his duties, &c. then this obligation to be void, else, &c. Done at *Richmond*, in the state of *Virginia*, the day and year above written. *John Archer*, [L. s.] *Thomas Nelson*, [L. s.] *Samuel Miles*, [L. s.] Signed, sealed, and delivered in the presence of *William Powers as to the two last, William Y. Archer as to ditto, William Woodford as to the first*.

"I, *John Archer*, do solemnly swear, that I will diligently and faithfully execute and perform the duties of *paymaster of the twentieth regiment of infantry*, of the army of the United States of North America, according to the best skill and abilities of which I am possessed—so help me God. Sworn and subscribed to at *Fredericksburg*, in the state of *Virginia*, this *fourth* day of *September*, eighteen hundred and *twelve*, before me, *J. Newly, J. P.*"

That the manuscript parts had been written in the absence of the defendants, and that the said paper had not, since the same was written, been sealed, or acknowledged, as the deed of the defendants by either of them, and at that time, the name of John Archer, the principal obligor was not subscribed to said paper: That the defendants, when they so signed, sealed, and

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delivered, as aforesaid, the said paper in blank, in the respects aforesaid, well knew that the paper aforesaid was to serve as the bond of the said deceased obligor, and of the defendants, as his sureties, for the duties of his said office, and by their signing, sealing, and delivering, aforesaid, the defendants intended to bind themselves as sureties in the official bond of said deceased obligor. That the said manuscript parts of said paper, afterwards, as aforesaid, inserted, were so inserted without any other authority from, or consent of, the defendants, than that which is given by, or implied from, their said act of signing, sealing, and delivering the said paper in blank, aforesaid, with full knowledge of the object and purpose aforesaid, intended to be attained thereby, and their consent, at the time of such signing, sealing, and delivering the said paper, it should serve that purpose: That the said paper so, as aforesaid, signed, sealed, and delivered, was accepted by the proper authorities of the United States, as the official bond of said deceased obligor, and of the defendants as his sureties.

Upon this state of facts the jury submitted to the Court the question, whether the paper in question be, or be not, the deed of the defendants? If it was their deed, then they found for the plaintiffs the debt in the declaration mentioned to be discharged by the payment of \$1932 74, the amount of Archer's defalcation: otherwise, for the defendants.

MARSHALL, C. J.—John Archer was appointed paymaster of the twentieth regiment of infantry, in the army of the United States. The defendants, Nelson and Myers, agreed to become his securities, and to execute such bond as was required by law. A printed paper, in the usual form, prepared for official bonds to be given by paymasters, was presented to and executed by them. At the time of its execution and delivery, all those parts which are usually written, including the penalty, the names of the obligors, and the date, were blank. John Archer, the principal, had not executed it.

This blank bond was afterwards filled up in the absence of

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the said Nelson and Myers, without their knowledge, and without any authority from them, other than is implied from their having executed the said paper with intention to bind themselves as the sureties of the said Archer, and with full knowledge of the object of the said bond. The jury further find, "that the paper so as aforesaid signed, sealed, and delivered, was accepted by the proper authorities of the United States as the official bond of the said Archer, and of the defendants as his sureties."

The defendants pleaded a special *non est factum*, and the jury has found the facts, and referred to the Court the question, whether this be the deed of the defendants?

At the common law, all instruments under seal were considered as deeds. Every contract not under seal was considered as a parol contract. To the consummation of every deed, the solemnity of a delivery is indispensable.<sup>(1)</sup> Until delivery, the writing does not become the deed of the party who had sealed it. It is also necessary to the validity of a deed that it be in writing. *Shepherd's Touchstone*, page 76. These two circumstances must concur, or there is no deed binding on the party whose seal is affixed to the paper.

The rule requiring that the deed should be written, implies, necessarily, that it binds no further than the writing binds. Perkins, sec. 118, says: "If a common person seal an obligation, or any other deed, without any writing in it, and deliver the same unto a stranger, man or woman, it is nothing worth, notwithstanding the stranger make it to be written that he who sealed and delivered the same unto him is bound unto him in £20."

There are many other authorities to the same effect. It would be useless to quote them, because the principle is not denied. In the case now under consideration, there being no sum of money mentioned in the bond, the defendants were no more bound by the instrument they had executed, at the time of its execution, than if the paper had been all blank. The United

(1) Opinion of Marshall, C. J. in *Bank of United States v. Danbridge et al.* 12 Wheat. 90.—[Editor.]

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States could not have availed themselves of the bond in its then condition. The whole question then, is, whether the defendants have authorized any other persons to fill up this bond, in such manner as to create an obligation which did not exist when it was delivered.

It is found by the jury that the defendants executed this bond with the knowledge that it was to be received as an official bond, and with an intention to bind themselves as the sureties of John Archer, as paymaster, by this sealing and delivery of it, but that no special authority was given to any person to fill it up, nor any authority whatever, other than is implied from their sealing and delivering the paper.

Does this act authorize any person whatever to insert the penalty and other written parts in the bond—and does it make the writing, in its present form, their deed?

If this question depended on those moral rules of action which, in the ordinary course of things, are applied by courts to human transactions, there would not be much difficulty in saying that this paper ought to have the effect which the parties, at the time of its execution, intended it should have. But there are certain technical rules growing out of the state of things, when many of our legal principles originated, which are firmly ingrafted on the law, and still remain a part of it, though the circumstances in which they had their birth are totally changed. Perhaps every distinction between a sealed and an unsealed instrument is of this description. But the distinction, and the rules which are founded on it, have taken such fast hold of the law, that they can be separated only by the power of the legislature. Till that authority shall interpose, the courts must respect the rules as they are found in adjudged cases. Those cases must be referred to in order to determine whether this be the deed of the defendants.

In the case stated in Perkins, the inference to be fairly drawn from the sealing and delivery of a paper, on which nothing was written, is, that the person to whom it was delivered was authorized to write over the signature and seal, if not any obli-

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gation he pleased, an obligation for some certain thing previously agreed on by the parties, and that the person making the instrument confided in him to whom this implied authority was given, for its faithful execution. It means this, or it means nothing. Yet the obligation written over this signature was declared to be of no validity. It follows, that the sealing and delivery of a paper does not imply an unlimited power to write even what had been previously agreed on by the parties. Shepherd, in his Touchstone, page 54, referring to this section of Perkins, says: "The agreement must be all written before the sealing and delivery of it; for if a man seal and deliver an empty piece of paper or parchment, albeit he do withal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed."

This declaration, if it be law, is conclusive, with respect to a paper which is sealed and delivered as the act and deed of the party, but which, at the time of the sealing and delivery, has nothing written in it. I proceed to those cases in which an obligation is written on the paper, which is incomplete at the time, and is afterwards made complete, or in any manner varied.

The case of *Markham v. Gonaston*, which is reported in *Cro. Eliz.* (2) and *Moor*, (547), was argued at great length, and considered by the court. That case depended on the question, whether an obligation executed with blanks for the christian name and place of residence of a person named in it, became void by filling up those blanks. The point was argued in three different suits. The first suit was brought against Fox, on an obligation made by Sir Francis Willoughby and said Fox, and upon the plea of *non est factum* being pleaded, the plaintiff became nonsuited. The party injured then brought an action on the case against the person who made the alteration, who pleaded that he had written the obligation by the command of Sir Francis Willoughby, with those blanks in it: that it was in this state executed by Fox: that the blanks were then filled up by order of Sir Francis Wil-

(2) 2 Croke's Reports, 676.—[Editor.]

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loughby, with the assent of Fox: after which Sir Francis executed the obligation. This plea was held ill on demurrer, and the court said, that the alteration was material, and that it avoided the bond.

Moor, in his report of this case, says, (*note*), that the plaintiff afterwards brought a new action on the obligation against Fox, who pleaded the special matter, and concluded that it was not his deed. The plaintiff replied, that it was filled up with the assent of both of the obligors; and upon demurrer it was adjudged for the plaintiff in B. R.

The note in Moor does not give us the words of the replication, but the term assent certainly implies an assent expressed, and the special plea of the person who made the alteration, as appears from Croke, was, that the alteration was made by order of one of the obligors with the assent of the other.

Hargrave and Butler, in their notes on Co. Lit., quote this case in the following terms: "Obligation, with a condition to save harmless, against Tracy, with a blank. A stranger, after the delivery, fills up the blank with a christian name, with the assent of the obligor, yet adjudged to avoid the deed because material. But if the addition is not material, as the addition of a county, and it be by a stranger, it doth not avoid the deed, though if by the party himself, it doth avoid it."

In the case of Zouch v. Clay, reported in 1 Ventris, (185), and 2 Levinz, (35), the defendant pleaded, that at the time of his executing the bond, there was a blank in it, which was afterwards filled up, with the name of another obligor, and so it is not his deed. The plea was held ill. Ventris says, the court considered the insertion of the name of a new obligor, as not affecting the person who had previously executed the obligation, it remaining the same as to him. Levinz, in his report of the case, says, that the name was inserted with the consent of all the obligors, and, therefore, the obligation was still binding.

In these cases, the obligation was complete, although the blanks had never been filled up. The alteration did not create or enlarge the obligation, or vary it to the injury of the obligor. They

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do not, therefore, contradict the law, as laid down in Perkins and Shepherd's Touchstone. In the case put by them, the obligation, if it exists, is created by the writing inserted after delivery. In the subsequent cases which have been noticed, the obligation was complete when it was delivered. The alteration was in the words, not in the obligation of the instrument, and that alteration was made with the assent of parties. I understand this to be an assent to the specific alteration; and to be an assent, not implied, but expressly given.

A case has been cited from 5 Mass. Rep.(3), decided by a judge, whose opinions deserve to be greatly respected, and whose decisions must always have great influence with any court in which they are quoted. The case is this: An official bond was prepared for C., with a blank for the name of the surety. Cushing, afterwards agreed to become surety, and executed the bond. The blank was filled up with his name in his absence; and then C. also executed it. Cushing pleaded *non est factum* to this bond, but it was determined to be his deed. No person will controvert this decision. The alteration was immaterial, and not being made by the obligor himself, could not, on any sound principle of law, affect the instrument. But a principle is laid down in the opinion, which goes much farther than the decision. Judge Parsons lays down the general rule, that any material alteration will avoid the bond, but states as an exception to this rule, an alteration made by consent of parties. He adds that, "the party executing the bond, knowing that there are blanks in it, to be filled up by inserting particular names or things, must be considered as assenting that the blanks may be thus filled, after he has executed the bond." Any distinction between an express and an implied assent, in a case where the implication is so strong, as it must be where a blank is to be filled of course "with a particular name or thing," is here denied. In such a case, there is undoubtedly, good sense in the opinion which rejects this distinction; but I am not sure

(3) Smith v. Crooker et al., 5 Mass. Rep. 538.—[Editor.]

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that it is sustained by law. He who adds to the obligation of another, must do so by the authority of that other; and I know of no case, in which, as respects a deed, such authority is implied in a court of law, certainly of none, when not even the person is designated, by whom the authority is to be executed.

But the proposition laid down by the very able judge who gave this opinion, does not necessarily extend to the case at bar. He lays down his principle, in a case "where a blank is to be filled by inserting particular names or things:" that is, where the blank is to be filled up only in one manner. But this principle does not apply to a blank to be filled up with a sum of money, which sum is not precisely fixed. It is also observable that in reviewing the cases on which he founds his opinion, the judge takes no notice of Perkins or Shepherd; and the case before him, as well as that which he supposes in giving his opinion, was not produced by a paper which was blank, or of no obligation whatever, when it was delivered. A blank of such vital importance, that the paper, while it remained, was a nullity, does not seem to have been in his view. For this reason, too, whatever authority may be ascribed to the opinion of Judge Parsons, and no person acknowledges his authority more willingly than myself, its application to the case at bar may well be doubted.

In *Russell v. Langstaffe*, Doug. 496,(4) it is determined by the court, that "the indorsement on a blank note, is a letter of credit for an indefinite sum." The same principle is asserted by this court, in *Violet v. Patton*, 5 Cranch, 151.(5) If these decisions apply to sealed instruments, they decide the cause now before the court; for the presumption is at least as strong, that the defendants intended, when they executed this bond, to allow the blank to be filled with such sum as the government would require in the official bond of a regimental paymaster, as that the person who signs a blank paper, intends to give in-

(4) 2 Douglas's Rep. 514, Frere's ed.—[*Editor.*]

(5) 2 Cond. Rep. Sup. Ct. U. S., 214.—[*Editor.*]



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definite credit to the person who receives it. They, would, too, completely overturn the principles laid down in the old books.

But there are certain differences in law between sealed and unsealed instruments, which make it difficult to apply the principles of one species of contract to the other; all unsealed instruments being considered as verbal contracts, they require neither writing nor delivery; they were not governed by those technical rules which are founded in the necessity of writing and delivery. General and liberal principles, therefore, which are laid down in such cases, cannot safely be applied to sealed instruments, unless the courts have expressed the intention so to apply them.

But the case on which most reliance is placed, is that of *Speake et al. v. The United States*, 9 Cranch, 28.(6) *Speake*, *Beverly*, and *Eliason*, had executed an embargo bond, and afterwards the name and seal of *Eliason* were removed, and those of *Ober* substituted in their place. To an action brought on this bond, the defendant, *Beverly*, pleaded that this alteration was made "without his consent, license, or authority." The plaintiff replied that the alteration was made "with the assent, and by the concurrent license, direction, and authority of all the defendants, and of the said *Ebenezer Eliason*." The defendant demurred to this plea, and the Court overruled his

(6) 3 Cond. Rep. Sup. Ct. U. S., 244. See also *Steele's Lessee v. Spencer et al.*, 1 *Peters's Rep.*, 552. In an action of ejectment, a deed was produced executed by *Spencer*, in which *Steele* was grantee, but it was apparent that the deed had been altered in this, viz., that the name of the grantee wherever it occurred, was written on an erasure, and with ink of a different colour; as also the words "*Ross*," and "*Ohio*," in describing the residence of the grantee, and these alterations were not accounted for in any manner by the testimony in the cause. The court below instructed the jury, that if the deed was altered in a material part, after it was sealed, attested, and acknowledged, such alterations made the deed absolutely void. But the Supreme Court said this was error, *although it might be true that a material erasure or alteration in a deed, after its execution, might avoid the deed*, yet, the instruction ought not to have been given in the terms used by the court. Whether erasures and alterations had been made in the deed or not, was a question of fact proper to be referred to the jury; but whether they were material or not, was a question of law which ought to have been decided by the court.—[*Editor*.]

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demurrer. On appeal to the Supreme Court, the judgment was affirmed.

The pleadings present the case of an express authority to make the alteration, and the only questions were, whether this express authority could avail the obligee, and whether it could be given by parol. Whatever previous difficulty might have existed on this point, there is none now. The case of *Speake v. The United States* has settled them; but that case goes no farther; it does not decide that an obligation may be created originally, by virtue of an authority, which is not expressly given, but is implied from the sealing and delivery of a paper, which, in its existing state, can avail nothing. This point does not appear to have been ever decided in the case of a sealed instrument. The case of *Speake v. The United States*, in determining that parol evidence of such assent may be received, undoubtedly goes far towards deciding it; and it is probable that the same court, may completely abolish the distinction, in this particular, between sealed and unsealed instruments. In this place I do not feel authorized to disregard it. In the English courts, from which the rules applicable to this subject are derived, the distinction is still maintained in a case which bears some analogy to this. The right of one partner to bind another, so far as respects the business of the trade, and the partnership property, is unquestioned; yet, if a partner affix a seal to the instrument, by which he promises in the name of the company to pay money, the English judges, with what propriety I shall not now say, have determined that the company is not bound by it.(7)

(7) But see a relaxation of this principle in *Anderson and Wilkins v. Tompkins*, *ante*, and the authorities there cited. See also 2 Wheat., Selwyn's N. P., title Partners, ch. ii., and the notes.

In Virginia, a *scroll* affixed by the obligor by way of seal, is of the same validity as if it were an actual seal of wax. 1 R. C., 510; and where the formal parts of the bond were printed, and the blanks filled up before the obligor signed it, the *scroll* being printed: this was held to be a good sealing within the statute. *Buckner v. Mackay*, 2 Leigh, 488.—[Editor.]

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I say with much doubt, and with a strong belief, that this judgment will be reversed, that the law on this verdict is, in my opinion, with the defendants.

*Note.*—Notwithstanding the strong distrust expressed by the Chief Justice, of the correctness of the above decision, no appeal was taken from it.

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PENDLETON Executor of PENDLETON v. THE UNITED STATES.

Before HON. JOHN MARSHALL, Chief Justice of the United States.

In a suit brought by the United States against the representative of a surety of M. and H., contractors to furnish rations to the troops of Virginia and Maryland, for the year 1802, a letter from the department of war, not authenticated in the form prescribed by the act of Congress, claiming advances made to the principals, up to the 6th of January, 1803, is inadmissible in evidence, and no admission of its correctness, express or implied, by the principals, can bind the surety.

Where a cause is removed from an inferior to a superior tribunal, by writ of error, no fact, not stated in the bill of exceptions, will be noticed.

MARSHALL, C. J.—This is a writ of error to a judgment of the District Court, obtained by the United States against the plaintiffs in error, for the sum of \$496 08, with interest from the 30th of September, 1808.

Philip Pendleton, the testator of the plaintiffs, had become bound to the United States as security for Michael M'Kewan and Daniel Hanagan, who were contractors to furnish rations to the troops in Virginia and Maryland, for the year 1802. This suit is brought for the balance of moneys unaccounted for, which was in their hands on the last day of December of that year. The breach assigned in the declaration, is the non-

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payment of \$1159 89, being the balance due from the said M'Kewan and Hanagan on the 31st day of December, 1802.

In support of this action, the attorney for the United States, offered in evidence a certificate from the treasury department, certified by the comptroller on the 3d day of October, 1821, stating, that, on a settlement of the accounts of Michael M'Kewan and Daniel Hanagan, late contractors for supplying the troops stationed in Maryland and Virginia, they are chargeable,

To balance remaining in their hands for moneys	
advanced from the 22d of October, 1801, to the	
6th of January, 1803, per report No. 15129,	\$ 1159 89
The same paper contains the following credits—	
On the 30th of June, 1808,	\$ 230
On the 30th of September,	306
	<hr/>
	586 00

Leaving due to the United States,	\$ 623 89
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This paper was objected to by the counsel for the defendants, and was rejected by the Court, because it claimed a gross sum of \$1159 89, for moneys advanced up to the 6th of January, 1803, to M'Kewan and Hanagan, whereas, the defendants were liable only for moneys advanced up to the last day of December, 1802.

The attorney for the United States then offered in evidence an affidavit made by the defendant, Philip Pendleton, December 1st, 1818, for the purpose of obtaining a continuance, in which he states, among other things, that during the pendency of the suit, and prior to the year 1810, he, with the other security in the bond, caused sundry payments to be made to an amount about equal to the sum stated to be due, after deducting therefrom the sum of \$ 392 54, or thereabouts, which was obviously, he thinks, an unjust charge against the securities. The vouchers for these payments were placed in the hands of Mr. Williams, with other documents, a gentleman then practising at this bar, who is since dead. After the death of Mr. Williams, a judg-

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ment was obtained, without any appearance for the defendant for upwards of \$2000, which, on his motion, was set aside, and a new trial granted. The affidavit then states, that a search was made among the papers of Mr. Williams, which resulted, as he is informed, in finding a statement made by Mr. Hay, the then attorney for the United States, admitting the incorrectness of the charge as against the sureties, a certificate of the treasurer of the United States as to the payment of \$160, on or about the 31st day of October, 1803, and a letter from the affiant to Mr. Williams, dated the 20th of April, 1809, in which he says: "I send you two receipts and a letter, evidencing the payment of \$696 of the judgment." These papers, the affiant says, are, as he is informed, mislaid, and he prays a continuance for the purpose of endeavouring to replace them.

The attorney for the United States also offered to read a letter from William Simmons to Michael M'Kewan, in these words:

*" Department of War, Accountants' Office,  
January 15th, 1803.*

Sir:—I have to acknowledge the receipt of yours of the 10th instant, with the papers, \* \* \* of which have been admitted, and your accounts as contractor for the year 1801, and of yourself and Daniel Hanagan for the year 1802, finally closed, leaving a balance due to the United States in each, to wit:

From yourself, as contractor for Virginia for the year 1802,	\$408 76
From yourself and D. H., and contractors for V. and M. for 1803,	767 35
	<hr/>
	\$1176 11

for which you are to make immediate payment to the United States.

WILLIAM SIMMONS."

The counsel for the defendant objected to the admission of this account from the treasury department, and of the letter from

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Mr. Simmons, which objection the Court overruled, "being of opinion, that the document from the treasury department was capable of being explained to the satisfaction of the jury, by reference to the letter from William Simmons to Michael M'Kewan, which letter was found by the attorney for the United States this day, among the papers filed in this case in this Court, and because from inspection of the same, the Court is satisfied, that the same was probably brought into Court many years ago, and has remained among the papers in this cause, as being produced originally by the said Michael M'Kewan, an original party in the cause to whom the same is directed." To this opinion the counsel for the defendant excepted, and the judgment is now before this Court on writ of error.

The letter from Simmons to M'Kewan, not being authenticated in the form prescribed by the act of Congress, derives no aid from that act, and the question concerning its admissibility is consequently dependent on general principles of law.

The record contains no evidence that Michael M'Kewan was ever a party to this cause. The declaration is against the executors of Philip Pendleton, deceased, who was one of the sureties of M'Kewan and Hanagan. I must presume, from the statement of the judge of the District Court, that a suit was originally brought against all the parties to the bond, and that on the death of Philip Pendleton, one of the obligors, this suit was brought against his executors, and that this paper was found in the original suit.

It is not stated by the judge, nor does it in any manner appear, that a trial ever took place as against M'Kewan, that this paper was ever read in evidence, or that it was filed with the permission of the Court. In what light, then, is this letter to be considered? I am by no means satisfied that it is not the paper of M'Kewan, which he would be at liberty to withdraw at his own pleasure, and would not be compellable to use. If seized by the attorney for the United States, he could not use it as evidence offered by M'Kewan, but as a letter addressed to and received by him. But if I am wrong in this, still it only estab-

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lishes the amount of the claim against M'Kewan and Hanagan, and does not show with sufficient precision, that the sureties were liable for the whole of the claim. The documents show, that on the books of the treasury; the sums for which the sureties are not liable are blended with those for which they are liable, and that the whole is claimed from them. The account certified by the comptroller, claims for moneys advanced to the contractors up to the 6th of January, 1803, without specifying the dates at which the several advances were made, or showing how much was advanced after the last day of December, 1802. The letter of the war accountant is dated after the 6th day of January, 1803, and states a balance to be due, varying from that contained in the account certified by the comptroller, but omits to state, that it was wholly due for advances made on or prior to the last day of December, 1802. It is said, that an inference may be fairly drawn from a comparison of these accounts, that the balance claimed in the letter of Mr. Simmons was due for advances for which the sureties are responsible. But inferences may be drawn either way, and this is not a case which ought to be left to uncertain inferences. The books of the treasury ought to show with precision and certainty the several periods at which the money was advanced, and an abstract from the books would be evidence in the cause. A court ought not to reason on a letter not explicit, and draw from it doubtful inferences, when the party requiring this course has in his possession testimony which would dispel every doubt.

If the letter does not show, when accompanied by the account certified by the comptroller, that all the money it claims was advanced before the 1st of January, 1803, then no acquiescence in it by M'Kewan, no admission of its verity, implied or expressed, can affect the security. M'Kewan's admissions show only his own liability; but if that is more extensive than the liabilities of his securities, they cannot be affected by admissions which apply to the claim against him generally, without discriminating between those parts of it which affect the sureties, and those which do not.

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Upon these reasons, I am of opinion that the letter of Simmons does not explain, with the requisite clearness, the account certified by the comptroller, and ought not to have been admitted.

I am not unmindful of the allegation made by the attorney for the United States, that the papers which would explain this transaction are burnt, and cannot be produced. But this fact is not stated in the bill of exceptions, and cannot be noticed. I can no more take it into consideration than I can the indorsement on the letter controverting the amount it claims, and, consequently, destroying every implication arising from its being considered the paper of M<sup>r</sup> Kewan. I must consider it as a paper, equivocal in itself, produced by a party in possession of testimony which is unequivocal. The judgment must be reversed.



# Circuit Court of the United States.

VIRGINIA, MAY TERM, 1823.

BEFORE

HON. JOHN MARSHALL, Chief Justice of the United States.

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## GAINES ET AL. V. SPANN'S EXECUTORS ET AL.

A testator made his will in Virginia, disposing of his estate among his wife and children, which will contained the following clause:—"It is farther my will that my wife shall clothe, maintain, and educate my children, in the best manner that the circumstances of the estate herein or hereby given, or to be given or bequeathed to her, will admit; *and that she shall consult my executors hereinafter named, as to the mode of my said children's education.*" The executors appointed by this will were the testator's brothers, J. and S. Some eighteen months after the date of this will, the testator made an additional will in England, ratifying and confirming his former will, disposing of property acquired subsequently to the execution of the first will. By the English will, the testator bequeathed pecuniary legacies to his children, to be paid out of the subsequently acquired estate, and £50 per annum to his wife, chargeable on those legacies. He then added: "And do will and direct that the *guardians* of my said children, by my said former will appointed, shall, by their bond, of a sufficient penalty, &c., secure to be paid to my said wife, for her life, as aforesaid, out of the moneys coming to their hands, or which they shall be in the receipt of, for the use of, or in trust for, my said children, the said annuity or yearly sum of £50." The testator appointed by this will P. and H. (both in England) "guar-

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dians of the persons and estates of (his) said children, during and until such time as the several sums of money by (him) hereinbefore bequeathed to them (could) be paid, for their use and benefit, into the hands of the several persons by (him) nominated and appointed *guardians of the persons and estates of (his) said children, under the said will and disposition by (him) made and executed, prior to (his) departure from America, as aforesaid.*" "And I hereby appoint the said P. and H. joint executors in trust of this my will." P., one of the executors and guardians under the English will, failing for a long period of time to account for the moneys which came to his hands, to a large amount, and eventually becoming insolvent, this suit was brought by the legatees, *inter alia*, to subject J. and S. to the payment of P.'s debt. *Held:*

1. That the first will did not appoint the executors J. and S. guardians also of the testator's children. Though no form of words is prescribed for the appointment of a guardian, and such appointment may be made by words of implication, yet these words must convey the powers essential to the office.
2. Nor does the recognition, in the English will, of the executors under the Virginia will as guardians, amount to an appointment of them, by implication, to that office. It is true that the two papers constitute, *in point of law*, but one will, but they are not to be so considered *in point of fact*. Had the English will been written (by way of codicil) on the same paper with the Virginia will; or had the Virginia will been before the testator when the English will was written, the subsequent clauses could not have been founded in ignorance or forgetfulness of the provisions of the Virginia will, but would have shown the construction put by the testator upon his own words, and that those words were intended to appoint, and did in fact appoint, the executors, J. and S., guardians also. In such case, it *seems* that the court would be bound to adopt the testator's construction. But in this case, there is no reason to suppose that the Virginia will was before the testator when he drew the English will. The testator relied upon his memory, and this betrayed him into the error of supposing that, by his former will, he had appointed J. and S. guardians, when that will, in fact, contained no such appointment. The question is not, whether a testator has a right to construe his own language, employed in a former will, but whether a plain *mistake* respecting that language shall control its natural construction, and give to it a meaning which it will not bear? This is forbidden, both by authority and by general principles.
3. *Quere*, whether the fact, assuming it to be true, that the executors under the first will acted as guardians, could influence the construction of the will? The proof that they did act in that character should at least be unequivocal. A general understanding that they were guardians, founded on the care taken by them of the infants and their estates, could not make them guardians: nor the fact of their signing their names (without adding their characters as guardians), to a direction to a clerk to issue a marriage license to one of the female infants, though it would have amounted to an acceptance of the guardianship, had the appointment been explicit.
4. But supposing J. and S. to have been guardians as well as executors, *quere* if

they would be chargeable, in their character of guardians, with legacies which they never received, and which, in strictness, never constituted a part of the ward's estate?

5. Nor were J. and S. responsible, *as executors*, for the legacies which came to P.'s hands. P. was both guardian and executor under the English will, and he received the legacies in one of those characters: if as guardian, the executors had no right to sue him for money of the wards which came lawfully to his hands, if it was not required for the payment of debts: if as executor, his co-executors could not sue him. The English will, too, directed the money to be paid to the *guardians* in Virginia, and not to the executors. The legatees, and not the executors, were the *cestuis que trust*, and they alone could coerce the execution of the trust.

CAMM GARLICK, Samuel Garlick, and John Garlick, citizens of Virginia, were the nephews of Edward Garlick, a subject of the king of Great Britain, residing in Bristol, from whom they expected considerable legacies. In 1780, Camm Garlick went to England for the purpose of visiting his uncle, who, some time afterwards, departed this life. By his will, Edward Garlick bequeathed to each of his nephews, Camm, Samuel, and John Garlick, £ 0000 sterling. In 1782, after the death of his uncle, Camm Garlick went to Portugal, on account of ill health, where he died some time in that year.

Before his departure from Virginia, viz., on the 21st of May, 1780, Camm Garlick made his will, disposing of his estate among his wife and children. In that will is the following clause: "It is further my will that my wife shall clothe, maintain, and educate my children in the best manner that the circumstances of the estate herein or hereby given, or to be given or bequeathed to her, will admit; and *that she shall consult my executors hereinafter named, as to the mode of my said children's education.*" The testator appointed his brothers, John and Samuel Garlick, executors of his will.

On the 6th of December, 1781, Camm Garlick, being then in England, made an additional will, in which he mentioned and confirmed his will made before his departure from Virginia. By this additional will, he bequeathed to his son Samuel, and his two daughters, Sarah and Mary Camm, pecuniary legacies, to be paid out of the money bequeathed to him by his uncle

Edward, and gave also £50 per annum to his wife, chargeable on the legacies to his children. He then added : " And do will and direct that *the guardians of my said children, by my said former will appointed*, shall, by their bond, of a sufficient penalty, or such other security as shall be thought reasonable and competent, secure to be paid to my said wife, for her life, as aforesaid, out of the moneys coming to their hands, or which they shall be in the receipt of, for the use of, or in trust for, my said children, the said annuity or yearly sum of £ 50." He also gave a legacy of £ 500 to Benjamin Pollard, who was then in England, and added : " And I do hereby appoint the said Benjamin Pollard, and the Reverend Mr. Thomas Hall (also in England) guardians of the persons and estates of my said children, during, and until such time as the several sums of money by me, hereinbefore bequeathed to them, can be paid for their use and benefit, into the hands of the several persons by me nominated and appointed *guardians of the persons and estates of my said children, under the said will and disposition by me made and executed, prior to my departure from America, as aforesaid.*" The testator then directed the said Pollard and Hall, as his money should be collected, " and until the same can be paid and applied as before mentioned," to place the same at interest for the benefit of his children ; " and I hereby appoint the said Benjamin Pollard and Thomas Hall joint executors in trust of this my will." He recommended it to his brothers to pay the sum of £100 yearly to the said Thomas Hall, for the space of three years, if that time should be required for the collection of the effects and settlement of the affairs of his uncle Edward ; and if his brothers should decline to comply with this recommendation, so long as the said Thomas Hall should be employed as one of his executors in settling the accounts of his uncle, he gave him a sum equal in proportion to the said sum of £ 300.

In 1783, a commercial partnership was formed between Samuel Spann, a merchant residing in Great Britain, and Benjamin Pollard, for the purpose of carrying on a trade in Virginia, under the name and firm of Benjamin Pollard & Co., and

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under the management of the said Benjamin Pollard. Into this concern the moneys of the Garlicks seem to have entered, and the privilege was reserved to John and Samuel Garlick, to become members of the company.

In 1784, Benjamin Pollard arrived in Virginia with a cargo of goods, and John and Samuel Garlick acceded to the proposition which was made to them, and became members of the company. The business of the firm was exceedingly disastrous, and ended in total insolvency.

In July, 1799, the legatees of Camm Garlick instituted a suit in the court of chancery of this state, against John and Samuel Garlick, the general executors of Camm Garlick, and against Benjamin Pollard, the executor in trust for the legacies bequeathed to them by Camm Garlick.

In 1803, the executors of Samuel Spann, instituted a suit in this Court against John and Samuel Garlick, and Benjamin Pollard, as surviving partners of Benjamin Pollard & Co., for a debt due from that company to their testator. Before any answer was filed, John and Samuel Garlick died, and the suit was revived against their representatives. They stated in their answer the suit brought against John and Samuel Garlick, as executors of Camm Garlick, by the legatees of the said Camm, which suit was revived against the respondents; that it was a debt of superior dignity to that claimed by Spann's executors, and that they were ignorant of its amount. They therefore prayed that provision for this claim might be made in the decree.

On the 17th day of December, in the year 1816, the cause came on to be finally heard, when this Court decreed that the administrator of Samuel Garlick, deceased, should pay to the plaintiffs, a small sum mentioned in the decree, and that Edward Garlick, the administrator of John Garlick, deceased, should pay to the plaintiffs out of the assets in his hands to be administered, the sum of \$16,238 92.

Under this decree, a considerable sum of money was paid into court by Edward Garlick, administrator of John Garlick,

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deceased, under a stipulation that it should be applied in such manner as the assets of John Garlick ought to be applied, in a due course of administration, so as not to create a devastavit.

After a great number of abatements, revivals and reports, in the cause depending in the state court, the chancellor, on the 30th day of June, 1820, after the suit was revived by consent, as to all the proper parties, set aside all the orders directing accounts, and the last report of the commissioner thereon, and directed an account to be taken which comprehended every matter in controversy, and, especially, the administration of John and Samuel Garlick, of the estate of Camm Garlick, and the administration of their estates by their respective representatives.

The commissioner stated an account between those parties on whom the case chiefly depended, which was received by consent, instead of the full report directed by the court. Some exceptions were taken which were in part overruled, and in part sustained; after which, the chancellor, by consent of parties, decreed that the defendant, Edward Garlick, administrator of John Garlick, should pay to Mary Camm Tunstal, one of the daughters of Camm Garlick, \$5169 21, with interest at the rate of five per cent. per annum, from the 1st of January, 1801, and to Sarah Gaines, the other daughter of the said Camm Garlick, the sum of \$4393 47, with like interest from the same time.

After this decree, the plaintiffs in that court, Mary Camm Tunstal and Sarah Gaines, filed their bill of interpleader in this Court, to which Spann's executors and the representatives of John and Samuel Garlick, were made defendants, stating the superior dignity of their debt, and praying that the sums of money paid into this Court by Edward Garlick, as administrator of John Garlick, deceased, and by the sureties in the administration bond of the said Edward, and which were under the control of the Court, should be paid to them.

The surviving executor of Samuel Spann, pleaded the decree of this Court, heretofore recited, in bar of the plaintiff's claim ;

and if this plea should be overruled, insisted in his answer that the decree in the state court ought not to affect him, because it was made by consent, and, therefore, could not be revised by a superior tribunal. He farther insisted that the money paid into court was applicable to this decree, if it ought to be so applied, and that it ought to be so applied, because his decree was prior, in point of time, and equal in dignity, the debt due to the plaintiffs, legatees of Camm Garlick, not being payable by John and Samuel Garlick, either as guardians or executors.(1)

The other defendants submitted themselves to the Court.

The plea was overruled, "the Court being of opinion, that, under the laws of this state, and on the sound principles of equity, the claim now set up by the plaintiffs ought to avail the representatives of John and Samuel Garlick, in like manner as if they had been able to establish it, before the decree was pronounced in favour of Spann's executors: but the Court was also of opinion, that the decree of the court of chancery of the state, having been given by consent, was not conclusive as to the dignity of the debt, or against a creditor having obtained a prior decree," and therefore directed one of its commissioners again to take the accounts between the parties, and to report them to this Court.

In pursuance of this order, the commissioner made his report, and the cause came on at this term on the report and on exceptions to it.

The commissioner stated his report according to the views of each party. The chief subject of controversy respected the debt due from Benjamin Pollard to the estate of Camm Garlick. The plaintiffs claimed to charge John and Samuel Garlick with Pollard's debt, as the guardians of the infant children of Camm

(1) In Virginia, the executors or administrators, of a guardian, of a committee, or of any other person who shall have been chargeable with the estate of a ward, idiot or lunatic, or the estate of a dead person, committed to their testator or intestate by a court of record, are required to pay so much as shall be due from their testator or intestate, to the ward, idiot or lunatic, or the the legatees or persons entitled to distribution, before any proper debt of their testator or intestate. 1 R. C. 1819; 389, § 60; and 406, § 12.—[Editor.]

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Garlick, or as his executors. They insisted that it was in the power of John and Samuel Garlick to collect the money due from Pollard, their omission to do which was gross negligence, which rendered them liable for the money lost. No portion of the estate of Camm Garlick, received by Benjamin Pollard, by virtue of the authority conferred upon him by the will of Camm Garlick, was ever accounted for by Pollard.

MARSHALL, C. J., said;—This claim depends on two questions:

1. Were John and Samuel Garlick testamentary guardians of the children of Camm Garlick?

2. Were they bound, as executors, to collect the debt due from Pollard?

1. Were they the testamentary guardians of the infant children of Camm Garlick?

His will, made in Virginia, empowers and directs his wife "to clothe, maintain, and educate his children, in the best manner that his estate, given to her, will admit," and desires her to consult his executors thereafter named as to the mode of their education.

It is admitted that a guardian may be appointed without using the term, and that no form of words is prescribed: but to appoint a guardian by implication, the powers essential to the office ought to be conferred. In this will, no power is given over the persons or estates of the orphans to John and Samuel Garlick. These remain with the mother, who is only to consult his executors as to the education of his children. She may follow or reject their advice, and they have no authority to enforce it. Nothing can be more clear, than that they are not appointed guardians in this will.

In his additional will, made in England, he ratifies and confirms the will made in Virginia, gives a legacy of £ 50 per annum to his wife, and directs that the guardians by his said former will appointed, shall, by their bond, of a sufficient penalty, "secure to be paid to his said wife for her life, out of the moneys coming to their hands, or which they shall be in receipt



of, for the use of, or in trust for, his said children, the said annuity or yearly sum of £50.

This is said to be a recognition of their character as guardians, and an appointment of them by implication to that office.

This is a point on which I have felt no inconsiderable difficulty. The two papers making in point of law but one will, and the last ratifying, confirming, and establishing the first, I have supposed that they might be considered as if written on the same paper, at the same time; and as if the words of the last recited clause had been—"My will is, that the guardians of my children, herein by me above appointed, shall, by their bond, &c." Had this been the fact, it would have been very certain that the testator understood his words as appointing a guardian; and, although the powers of a guardian were in reality conferred on his wife, and not on his executors, the inference would have been very strong that the words of the last clause refer to his executors, and not to his wife, because the persons he supposed himself to have appointed, were directed to give bond, and to pay money to his wife. The allusion to his executors is almost as strong as if he had named them; and had he done so, had the language of such a will been—"It is my desire that my brothers, John and Samuel Garlick, whom I have hereinbefore appointed guardians of my children, shall, by their bond, &c., secure to be paid to my said wife, &c.," it would be difficult to resist the argument that such language would amount to an actual appointment.

The subsequent clause, too, appointing Benjamin Pollard and the Rev. Thomas Hall guardians of the persons and estates of his children, until the legacies bequeathed to them in England could be collected and paid to the guardians appointed by his first will, would, under the same view of the case, afford an argument equally strong in favour of the construction for which the plaintiffs contend. I was the more disposed to yield to this construction, from perceiving that the chancellor, who decided the cause in the state court, treated John and Samuel Garlick as guardians. Had this point been directly made, and directly

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determined by him, the leaning of my own judgment to the contrary opinion would, probably, have yielded to my respect for his decision. But the point was not directly made; the report was not excepted to on this account; and the parties seem to have proceeded on the idea that John and Samuel Garlick were to be considered as guardians, and were, in that character, liable for Pollard's debt.

Taking this view of the decree, I have felt it to be my duty to consider the question, uninfluenced by the proceedings of the state court.

I do not think that the case can be considered as if the two papers formed, in point of fact as well as law, one instrument. Had the provisions of the first will been before the testator when he wrote the last, the subsequent clauses could not have been founded on ignorance or forgetfulness of what he had before written, but would have shown his construction of the clause referred to. They would have shown his opinion, that the words he had previously employed were competent to the appointment of guardians for his children, and that he employed them with that intent. In such a case there would be great force in the argument requiring the Court to construe these words as the testator himself obviously construed them. But in the case at bar, we have no reason to suppose that the will made in Virginia was in possession of Camm Garlick when he made his will in England. It rested only in his memory. We have, therefore, no right to suppose that the words used in it were used in a sense which they will not bear; we can only suppose that he was under a mistake respecting it; that he had no distinct recollection of it; that he supposed it to contain an appointment of guardians, when it contained no such appointment.

I can find no case which decides that any thing passes by words used clearly under such mistake. In *Wright v. Wivell*, 4 Ba. Abr. 290, reported in 3 Lev. 259; 2 Ven. 57; and *Moor*, 31; A. devised to his wife £600, to be paid to J. S., for the payment of lands he purchased from him, and are already settled on her for her jointure; the lands were not settled on her;

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and adjudged in favour of the heir; they did not pass by implication. The testator certainly supposed the lands were settled, but this mistake did not give the wife a right to them.

So, in the same book, page 339, the following passages are cited from Godolphin, 282: "If a man says, *out of the £100 which I bequeathed to A., I give B. £50*; this is a good bequest of the £50 to B., because only a false demonstration in an immaterial circumstance, which shall not vitiate the legacy; but in this case, A. takes nothing; for words of diminution shall never be construed to give a legacy by implication. But if the demonstration be totally false, as if the testator says, *I bequeath to A. the £100 which I have in my chest*, and there is not any money in the chest, the legacy is void.

So in the case at bar; a direction that money shall be paid to the persons who were, in a former will, appointed the guardians of his children, when no persons were so appointed, is a plain mistake, and can give no rights to those whom we may suppose the words allude to. Had his brothers been named, so as to render it absolutely certain that they were the persons to whom he alludes, this mere mistake would not, I think, under the authorities which have been quoted, or on general principles, have amounted to an appointment; their not being named would render it still more unjustifiable to put the construction on the will which is required by the plaintiff.

If the words themselves be analyzed, nothing can be extracted from them intimating an intention in the testator to appoint; they only show the mistaken idea that he had made an appointment. This was completely an error in his recollection, and the Court cannot, I think, supply the defect.

It is contended that they acted as guardians, and this fact is supposed to show their understanding of the will, and to have some influence on its construction.

The proof that they acted as guardians is, I think, equivocal. Had the appointment been explicit, the evidence would be sufficient to show their acceptance of the office; but no regular

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appointment having been made, the evidence does not, I think, make out a clear case of their acting as guardians.

Several witnesses depose to a general understanding, founded on the care they took of the infants and their property, that they were the guardians; but, I think, no fact, except signing a direction to the clerk to issue a marriage license for one of the young ladies, is proved, which is not entirely compatible with the relation in which they stood to the family, admitting them not to think themselves guardians.

The testator had devised the whole of his estate to his wife during the minority of his children, charging her with their maintenance and education. There was, then, no estate for the guardian to manage. It did not belong to the children during their infancy, but to their mother. If their uncles attended to it, such attention could neither make them guardians, nor make the estate their property. It was an attention to be expected from their connexion with the family, and they would have been chargeable with want of natural affection had they refused it.

To the authority to the clerk to issue a marriage license, they sign their names, but do not add their character as guardians. This cannot make them guardians; and although it would amount to an acceptance of the guardianship, had they been appointed, it was dated in June, 1798, before which time Pollard had become insolvent.

But supposing John and Samuel Garlick to have been the guardians of the infant children of Camm Garlick, are they responsible in that character for Pollard's debt?

A guardian is, undoubtedly, responsible for all the estate of the ward, real or personal, which comes to his hands; but is he responsible for moneys which he might, but did not collect, and which, in strict legal language, never formed a part of the ward's estate?

A legacy is not a part of the estate of the legatee, until the executor assents to it. As a part of the personal estate of the

testator, it is cast by law on the executor, who has a right to retain it till debts are paid. I have seen no case in which a guardian is charged with a legacy, until he has received it. I do not know that this point has ever been settled in the courts of the state. Were I of opinion that John and Samuel Garlick were really to be considered as testamentary guardians, I should think it necessary to look into this point, before I should feel myself justified in saying that they were chargeable with this legacy.

If John and Samuel Garlick are not chargeable with Pollard's debt, as guardians, we are next to inquire whether

2. They are chargeable as executors?

This depends, I think, on the English will, and on the character held by Pollard, under that will.

That John and Samuel Garlick were general executors, and that they are liable for this debt, if it was their duty to collect it, and if they had the right and the power to enforce its payment, are, I think, propositions not to be questioned. The whole inquiry, then, is, was it their duty to collect it, and could they coerce its payment?

The clauses of the will which relate to this subject, are those in which Benjamin Pollard and Thomas Hall are appointed guardians of his children, and executors of his will. They are in these words: "And I do hereby appoint the said Benjamin Pollard and the Rev. Thomas Hall, guardians of the persons and estate of my said children, during, and until such time as the several sums of money by me hereinbefore bequeathed, can be paid for their use and benefit, into the hands of the several persons by me nominated and appointed guardians of the persons and estates of my said children, under the said will and disposition, by me made and executed prior to my departure from America, as aforesaid." "And I hereby appoint the said Benjamin Pollard and Thomas Hall, joint executors, in trust, of this my will."

The legacies to which the plaintiffs were entitled, were in the hands of Benjamin Pollard, either as their guardian, or as

executor. Let it be that the money was held by him as guardian. Have the executors a right to sue the guardian for money of the ward, which came lawfully to his hands, if it be not required for the debts of the testator? I believe he has no such right; I am persuaded that such a suit would be of the first impression.

But on coming to America, Benjamin Pollard ceased to be guardian, and was bound to pay over the money to those who were entitled to receive it. But who were entitled to receive it? Not the executors, I think, because it had been paid by them to the guardian for the use of the infants, and had consequently become a part of their estate. The testator had shown his intention that the executors in Virginia should not receive it, for he directed specially that the money should be paid to the guardians in Virginia. Had the executors been really guardians, they would have received the money as guardians, not as executors. Had the guardians and executors been different persons, the money would have been payable to the guardians, not to the executors—if not required for debts.

But suppose the executors entitled to receive this money, would this circumstance attach responsibility to John and Samuel Garlick? Benjamin Pollard, who was in possession of it, was also an executor; if he is to be considered as a general executor, the law is clear that one executor cannot sue another, and that one executor is not liable for money in the hands of another. The question whether he is to be considered as general executor, or, if not, what limitations are imposed on his power, depends on the will. The words are, "and I hereby appoint the said Benjamin Pollard and Thomas Hall joint executors in trust of this my will." The particular paper which contains this appointment, contains also a reference to, and a confirmation of, the former will. The two papers make one instrument, and constitute one will in law, and I should feel some difficulty in determining the question, whether Benjamin Pollard was not executor in Virginia as well as in England;

whether he was executor of the whole will, or of that particular paper only which was executed in England.

But let it be conceded that he was to execute that part of the will only which was made in England. What is the extent of his power, and what the relation in which he stood to the executors in Virginia, and to the legatees of Camm Garlick?

He was an executor in trust of the English will; his power and duty under that will were, to settle the affairs of Camm Garlick in England, collect the money due to him, and pay it to the guardians of his children in Virginia. The guardians were to become trustees of the money for the benefit of the infants. The beneficial interest, then, was, from the commencement, in the infants; the executors and guardians in England were trustees for them. Benjamin Pollard continued to be executor for the purpose of the trust; he received the money as executor and trustee, and retained those characters till the trust was executed. If, then, the money was in his hands as guardian, and the executors had a right to collect it, Benjamin Pollard might be considered executor of that part of the will, and being in possession of the money, his co-executors had no power over it.

If this money which he collected is to be considered as remaining in his hands as executor, a part of the foregoing reasoning applies directly to the question. He was, it must be admitted, unfaithful to his trust as executor in trust; but he still retained that character, and could not divest himself of it till the trust was executed; the children, and not the executors, were the *cestui que trust*; the children, and not the executors, could coerce its execution; the executors, therefore, cannot be responsible for its non-execution.

I feel myself constrained to say, that the representatives of John and Samuel Garlick, are not chargeable with Pollard's debt.

## THE UNITED STATES V. MAURICE ET AL.

Before Hon. JOHN MARSHALL, Chief Justice of the United States.

The Constitution of the United States, art. 2, sec. 2, which declares that the President "shall nominate, and, by and with the consent of the Senate, shall appoint ambassadors, &c.," "and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law," taken in connexion with the subsequent clause of the same section, which authorizes Congress "by law to vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments," and with the third section of the same article empowering the President to fill "all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session," is interpreted to declare, that all offices under the federal government, except in cases where the Constitution itself may otherwise provide, shall be established by law.

An agent of fortifications is an officer of the United States, whose office is established by law. [See Acts of Congress of April 24th, 1816, sec. 9, and March 2d, 1821, sec. 13.]

The act of Congress, passed on the 15th of May, 1820, "providing for the better organization of the treasury department," which gives a new and summary remedy against officers of the United States, who have received public money for which they have failed to account, and against their sureties, substituted by implication the new and sufficient bond called for by that act, for the former bond, and discharged the sureties to the original bond, so far as respected subsequent transactions.

Appointments to office can be made by the heads of department, in those cases only which Congress has authorized by law, and, therefore, the appointment of an agent of fortifications by the secretary of war, there being no act of Congress conferring that power upon that officer, is irregular.

An official bond given by an agent of fortifications, whose appointment was irregular, but whose office is established by law, though void as a statutory obligation, is valid as a contract to perform the duties appertaining to the office of agent of fortifications, and is binding on his sureties. Contract is one of the means necessary to accomplish the objects of the institution of the government, and the capacity of the United States to contract is co-extensive with the duties and powers of government. Every contract which subserves to the performance of a duty, may be rightfully made.

It is not essential to the validity of a contract made between an individual and the government, that it should express the circumstances under which it was made, so precisely and distinctly, as to show the motives which induced it, and the objects to be effected by it. These are matter of evidence.



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The *duty* of the government to secure its debts, necessarily infers the means of securing them, and sureties may therefore be required to the bond given by the debtor.

Every contract which is legal on its face, and imports a consideration, is supposed to be entered into on valid considerations, and to be obligatory, if the parties be ostensibly able, until the contrary is shown, and the same rule applies to a government which is capable of making contracts.

That is certain which may be rendered certain, and, therefore, if the condition of a bond, instead of specifying the particular purposes for which the bond is given, refers to a paper which does specify them, it is equivalent to the enumeration of those purposes in the bond itself.

Where an appointment to office is irregular—is contrary to law and its policy, this does not absolve the person so appointed from the moral and legal obligation to account for public money, which has been placed in his hands in consequence of such appointment.

MARSHALL, C. J., delivered the following opinion, containing a full narrative of the facts and pleadings in the cause:

This is an action of debt brought upon a bond executed on the eighteenth day of August, 1818, in the penalty of twenty thousand dollars, with the following condition: "Whereas the said James Maurice has been appointed agent for fortifications on the part of the United States, now, therefore, if the said James Maurice shall truly and faithfully execute and discharge all the duties appertaining to the said office of agent, as aforesaid, then the above obligation to be void, &c." The breach assigned in the declaration is, that large sums of money came to the hands of the said Maurice, as agent of fortifications, which he was bound by the duties of his office faithfully to disburse and account for, a part of which, namely, forty thousand dollars, he has, in violation of his said duty, utterly failed to disburse to the use of the United States, or account for; wherefore, &c.

The defendants, the sureties in the said obligation, prayed oyer of the bond, and of the condition, and then demurred to the declaration. The plaintiff joined in the demurrer.

The defendants also pleaded several pleas, on some of which

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issue has been made up, and on others, demurrer has been joined.

The first point to be considered is the demurrer to the declaration.

The defendants insist that the declaration cannot be sustained, because the bond is void in law, it being taken for the performance of duties of an office, which office has no legal existence, and consequently, no legal duties. No violation of duty, it is said, can take place, when no duty exists.

Since the demurrer admits all the facts alleged in the declaration, which are properly charged, and denies that those facts create any obligation in law, it must be taken as true that James Maurice was in fact appointed an agent of fortification on the part of the United States; that he received large sums of money in virtue of that appointment, and has failed to apply it to the purpose for which he received it, or to account for it to the United States.

As the securities certainly intended to undertake that Maurice should perform the very acts which he has failed to perform, and as the money of the nation has come into his hands on the faith of this undertaking, it is the duty of the Court to hold them responsible, to the extent of this undertaking, unless the law shall plainly interpose its protecting power for their relief, upon the principle that the bond creates no legal obligation. Is this such a bond? The first step in this inquiry, is the character of the bond. Does it, on its face, purport to be a mere official bond, or to be in the nature of a contract? This question is to be answered by a reference to the terms in which its condition is expressed. These leave no shadow of doubt on the mind. The condition refers to no contract—states no undertaking to perform any specific act—refers to nothing—describes nothing which the obligor was bound to do, except to perform the duties of an officer. It recites that he was appointed to an office, and declares that the obligation is to be void if he “shall truly and faithfully execute and discharge all the duties apper-

taining to the said office." Of the nature of those duties no information whatever is given. Whether the disbursement of public money does or does not constitute a part of them, is a subject on which the instrument is entirely silent.

The bond, then, is, on its face, completely an official bond, given, not for the performance of any contract, but for the performance of the duties of an office, which duties were known, and had been prescribed by law, or by persons authorized to prescribe them.

In his declaration, the attorney for the United States has necessarily taken up this idea, and proceeded on it. In his assignment of breaches, he states that the said James Maurice had been appointed agent of fortifications, and alleges that he had not performed the duties of the said office, nor kept the condition of his bond, but that the said condition is broken in this, that while he held and remained in the said office, divers large sums of money came to his hands, as agent of fortifications, which he was bound by the duties of his office faithfully to disburse and account for; a part of which, forty thousand dollars, he has, in violation of his said duty, utterly failed to disburse or account for. On this breach of his official duty, which is alleged to constitute a breach of the condition of his bond, the action is founded. No allusion is made to any other circumstance whatever as giving cause of action.

The suit then is plainly prosecuted for a violation of the duty of office, which is alleged to constitute a breach of an official bond. The Court must, on this demurrer, at least, so consider it, and must decide it according to those rules which govern cases of this description. This being a suit upon an official bond, the condition of which binds the obligors only that the officer should perform the duties of his office, it would seem that the obligation could be only co-extensive with these duties. What is their extent? The defendants contend that no such office exists; that James Maurice was never an officer, and, of consequence, was never bound by this bond to the performance of any duty whatever.

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To estimate the weight of this objection, it becomes necessary to examine the Constitution of the United States, and the acts of Congress in relation to this subject.

The Constitution, art. 2, sec. 2, declares, that the President "shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, &c.," "and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law."

I feel no diminution of reverence for the framers of this sacred instrument, when I say that some ambiguity of expression has found its way into this clause. If the relative "*which*," refers to the word "appointments," that word is referred to in a sense rather different from that in which it had been used. It is used to signify the act of placing a man in office, and referred to as signifying the office itself. Considering this relative as referring to the word "offices," which word, if not expressed, must be understood, it is not perfectly clear whether the words "which" offices "shall be established by law," are to be construed as ordaining, that all offices of the United States shall be established by law, or merely as limiting the previous general words to such offices as shall be established by law. Understood in the first sense, this clause makes a general provision, that the President shall nominate, and by and with the consent of the Senate, appoint to all offices of the United States, with such exceptions only as are made in the Constitution; and that all offices (with the same exceptions) shall be established by law. Understood in the last sense, this general provision comprehends those offices only which might be established by law, leaving it in the power of the executive, or of those who might be entrusted with the execution of the laws, to create in all laws of legislative omission, such offices as might be deemed necessary for their execution, and afterwards to fill those offices.

I do not know whether this question has ever occurred to the legislative or executive of the United States, nor how it may have been decided. In this ignorance of the course which may have been pursued by the government, I shall adopt the

first interpretation, because I think it accords best with the general spirit of the Constitution, which seems to have arranged the creation of office among legislative powers, and because, too, this construction is, I think, sustained by the subsequent words of the same clause, and by the third clause of the same section.

The sentence which follows, and forms an exception to the general provision which had been made, authorizes Congress "by law to vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments." This sentence, I think, indicates an opinion in the framers of the Constitution, that they had provided for all cases of offices.

The third section empowers the President "to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

This power is not confined to vacancies which may happen in offices created by law. If the convention supposed that the President might create an office, and fill it originally without the consent of the Senate, that consent would not be required for filling up a vacancy in the same office.

The Constitution then is understood to declare, that all offices of the United States, except in cases where the Constitution itself may otherwise provide, shall be established by law.

Has the office of agent of fortifications been established by law?

From the year 1794 to the year 1808, Congress passed several acts, empowering the President to erect fortifications, and appropriating large sums of money to enable him to carry these acts into execution. No system for their execution has ever been organized by law. The legislature seems to have left this subject to the discretion of the executive. The President was, consequently, at liberty to employ any means which the Constitution and laws of the United States placed under his control. He might, it is presumed, employ detachments from the army,

or he might execute the work by contract, in all the various forms which contracts can assume. Might he organize a corps, consisting of labourers, managers, paymasters, providers &c., with distinct departments of duty, prescribed and defined by the executive, and with such fixed compensation as might be annexed to the various parts of the service? If this mode of executing the law be consistent with the Constitution, there is nothing in the law itself to restrain the President from adopting it. But the general language of the law must be limited by the Constitution, and must be construed to empower the President to employ those means only which are constitutional. According to the construction given in this opinion to the second section of the second article of that instrument, it directs that all offices of the United States shall be established by law: and I do not think that the mere direction that a thing shall be done, without prescribing the mode of doing it, can be fairly construed into the establishment of an office for the purpose, if the object can be effected without one. It is not necessary, or even a fair inference from such an act, that Congress intended it should be executed through the medium of offices, since there are other ample means by which it may be executed, and since the practice of the government has been for the legislature, wherever this mode of executing an act was intended, to organize a system by law, and either to create the several laws expressly, or to authorize the President in terms, to employ such persons as he might think proper, for the performance of particular services.

If, then, the agent of fortifications be an officer of the United States, in the sense in which that term is used in the Constitution, his office ought to be established by law, and cannot be considered as having been established by the acts empowering the President, generally, to cause fortifications to be constructed.

Is the agent of fortifications an officer of the United States? An office is defined to be "a public charge or employment," and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of

the United States. Although an office is "an employment," it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.

If it may be converted into a contract, it must be a contract to perform the duties of the office of agent of fortifications, and such an office must exist with ascertained duties, or there is no standard by which the extent of the condition can be measured.

The army regulations are referred to in acts of Congress, passed previous and subsequent to the execution of the bond under consideration. A copy of those regulations, purporting to be a revisal made in the war office, in September, 1816, conformably to the act of the 24th of April, 1816, has been laid before the Court, and referred to by both parties. These regulations provide for the appointment, and define the duties of the agents of fortifications.

They are to be governed by the orders of the engineer department in the disbursement of the money placed in their hands. They are to provide the materials and workmen deemed necessary for the fortifications; and they are to pay the labourers employed. In the performance of these duties they are directed to make out, first, an "abstract of articles purchased;" secondly, "an abstract of labour performed;" thirdly, "an abstract of pay of mechanics;" and fourthly, "an abstract of contingent expenses."

These duties are those of a purchasing quartermaster, commissary, and paymaster. These are important duties. A very superficial examination of the laws will be sufficient to show,

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that duties of this description, if not performed by contract, are performed by persons who are considered as officers of the United States, whose offices are established by law.

If, then, we look at the bond and declaration, we find in both every characteristic of an office bond. If we look at the army regulations, the only additional source of information within our reach, we find the duties of an agent of fortifications to be such as would make him an officer of the United States. Is the office established by law? The permanent agents mentioned in the act of March 3d, 1809, (ch. 19, sec. 3), are those who are appointed, "either for the purpose of making contracts or for the purchase of supplies, or for the disbursement, in any other manner, of moneys, for the use of the military establishment of the United States." If this act authorizes the appointment of such agents, and virtually establishes their offices, it cannot, I think, in correct construction, be extended to other persons than those who are employed in some manner in disbursing money "for the use of the military establishment or navy of the United States." "The military establishment" is a term which seems to be well defined in the acts of Congress, and to be well understood, and I do not think the act can be construed to comprehend an agent of fortifications.

In the act of March 3d, 1817, ch. 517, sec. 5, it is made the duty of the secretary of war "to prepare general regulations, better defining and prescribing the respective duties and powers in the adjutant-general, inspector-general, quartermaster-general, and commissary of ordnance, department of the topographical engineers, of the aids of generals, and generally of the general and regimental staff; which regulations, when approved by the President of the United States, shall be respected and obeyed, until altered or revoked by the same authority."

The exclusive object of this section is, I think, the regulation of existing offices. I do not think it can be fairly construed to extend to the establishment of offices. Yet if under this act, subordinate agencies or offices have in fact been introduced, such offices may be established by subsequent acts of Congress.



The act of April 24th, 1816, "for organizing the general staff, and making farther provision for the army of the United States," sec. 9, enacts, "that the regulations in force before the reduction of the army, be recognised, as far as the same shall be found applicable to the service, subject, however, to such alterations as the secretary of war may adopt, with the approbation of the President."

A legislative recognition of the actually existing regulations of the army must be understood as giving to those regulations the sanction of the law; and the subsequent words of the sentence authorize the secretary of war to alter those regulations with the approbation of the President. Such alterations have also the sanction of the act of 1816.

This subject appears to have been taken up by the secretary. A pamphlet entitled, "Army Regulations Revised, conformably to the Act of 24th of April, 1816," has been laid before the Court as authentic, and has been appealed to by both plaintiff and defendants, as being the same regulations which are approved and adopted by the act of the 2d of March, 1821, sec. 13.

These regulations direct the appointment of agents of fortifications, and define their duties. They purport to have been revised in the war office, in September, 1816. If the provision they contain respecting agents of fortifications formed a part of the army regulations prior to the act of the 24th of April, 1816, it is recognised by that act. If that provision was first introduced in September, 1816, it is recognised by that act. If that provision was first introduced in September, 1816, it may, if approved by the President, be considered as an alteration authorized by that act. The question whether this alteration has been approved by the President, is perhaps a question of fact, not examinable on this demurrer.

When I consider the act of the 24th of April, 1816, and this revisal in the war office, in connexion with the act of the 2d of March, 1821, adopting the revisal of September, 1816, under the name of general regulations of the army, compiled by Major General Scott (for they are represented as being the same

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regulations), I feel much difficulty in saying that the office of agent of fortifications was not established by law when this bond was executed. I am more inclined to give this opinion, because I am persuaded this cause must be carried before a tribunal which can make that certain which was before uncertain; and because, by overruling the demurrer to the declaration, the other questions of law which occur in the cause, and which would be arrested by sustaining the demurrer to the declaration, will all be brought before the Supreme Court.

The defendants pleaded several pleas to the declaration. The second plea is, that the defendant, James Maurice, performed the condition of his bond up to the 26th day of September, 1820, on which day a new bond was executed, in pursuance of the act of the 15th of May, 1820, "providing for the better organization of the treasury department." The plaintiff takes issue on that part of the plea which alleges performance up to the 26th day of September, 1820, and demurs to the residue.—The act under which this new bond was executed, gives a new and summary remedy against officers of the United States who had received public money for which they had failed to account, and against their sureties, and contains a proviso: "That the summary process herein directed, shall not affect any surety of any officer of the United States who became bound to the United States before the passing of this act; but each and every such officer shall, on or before the thirtieth day of September next, give new and sufficient sureties for the performance of the duties required of such officer." The defendants contend that this new and sufficient bond was a substitute for the old one, and discharged the sureties to the original obligation, so far as respects subsequent transactions.

The plaintiff contends that the bond is cumulative, and that the sureties to the first obligation continue bound for any subsequent as well as any preceding default of the officer.

There is certainly no express declaration of the act on this subject; and if the second bond operates a discharge of the first, this effect is produced by implication only: yet the implication is very strong in favour of the construction.

The sole object of the law is to obtain sureties against whom the new and summary remedy it gives might be used. To obtain additional security, does not appear to be one of the motives for which it was passed. The direction that the sureties should be "new" and "sufficient," countenances the opinion that they were solely relied on for the subsequent transactions of the officer. If no additional security was intended to be demanded; if the sole object of the law was to coerce the giving of sureties, against whom this new remedy, by distress, might be used, it seems reasonable to think that the legislature supposed the new sureties alone responsible for the subsequent conduct of their officer. It could not escape the consideration of the legislature, that the same friends who became bound in the first bond, might probably become bound in the second, thinking themselves discharged from the first. But friends may be willing to become bound in a penalty within their resources, or to an amount to which the officer can secure them, and very unwilling to become bound in double that sum. The officer may be able to give security in a penalty of \$25,000, and totally unable to give security for \$50,000. The government fixes the penalty in which an officer shall give bond and sureties, and is regulated, in fixing that penalty, by all the considerations which belong to the subject. It ought not to be considered as augmenting that penalty, unless the means used for augmenting it are plain, direct, and intelligible. In this case, if the same sureties execute the new bond, they are liable to a double penalty, by an act not clearly understood to have that effect. If there are new sureties to the new bond, the attention of the old sureties may be diverted from watching the conduct of the officer, and they may even be induced to relinquish liens on property, in order to enable the officer to find his new sureties.

If the course of legislation on the subject has been such as to furnish to the original sureties reasonable ground for the opinion that they were discharged from all liability for the subsequent conduct of the officer, and reasonable ground for the implication that such was the intention of the legislature, and I

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think it has, such ought to be the construction of the act. This demurrer, therefore, is overruled.

The fifth plea is, that James Maurice was never legally appointed, but was, on the 1st day of August, 1818, appointed by the secretary of war, agent of fortifications for Norfolk, Hampton Roads, and the lower part of the Chesapeake Bay, without any provisions of law whatever, authorizing and empowering him to make such appointment, and directly contrary to an act entitled, an act &c., passed the 3d of March, 1809.

To this plea there is a demurrer.

The first question arising on this demurrer, respects the validity of this appointment, made by the secretary of war. It is too clear, I think, for controversy, that appointments to office can be made by heads of department, in those cases only which Congress has authorized by law; and I know of no law which has authorized the secretary of war to make this appointment. There is certainly no statute which directly and expressly confers the power; and the army regulations, which are exhibited as having been adopted by Congress, in the act of the 2d of March, 1821, declares that agents shall be appointed, but not that they shall be appointed by the secretary of war. If this mode of appointment formed a part of the regulations previous to the revision of September, 1816, that is a fact which might or might not be noticed if averred in the pleadings. The Court is not informed of its existence by this demurrer. It must therefore be supposed not to exist, and James Maurice cannot be considered as a regularly appointed agent of fortifications.

This brings us to the question in the cause on which I have felt, and still continue to feel, great difficulty. The appointment of James Maurice having been irregular, is this bond absolutely void, or may it be sustained as a contract entered into by a person not legally an officer, to perform certain duties belonging to an office? If the office had no existence, it has been already stated, that a bond to perform its duties generally, could create no obligation, but since the office does exist, the condi-

tion refers to something certain by which the nature and extent of the undertaking of the obligor may be determined. It is an undertaking that James Maurice shall perform the duties appertaining to the office of agent of fortifications: and this undertaking is in the nature of contract. If this contract does not bind the parties according to its expressed extent, its failure must be ascribed to some legal defect or vice inherent in the instrument. It is contended that the bond is void, because there is an inability on the part of the United States to make any contract not previously directed by statute.

The United States is a government, and, consequently, a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with great powers for important purposes. Its powers are unquestionably limited; but while within those limits, it is a perfect government as any other, having all the faculties and properties belonging to a government, with a perfect right to use them freely, in order to accomplish the objects of its institutions. It will certainly require no argument to prove that one of the means by which some of these objects are to be accomplished, is contract; the government, therefore, is capable of contracting, and its contracts may be made in the name of the United States.

The government acts by its agents, but it is neither usual nor necessary to express, in those contracts which merely acknowledge the obligation of an individual to the United States, the name of the agent who was employed in making it. His authority is acknowledged by the individual when he executes the contract, and is acknowledged by the United States when the government asserts any right under that contract. I do not mean to say that there exists any estoppel on either party; I only mean to say that a contract executed by an individual, and received by the government, is *prima facie* evidence that it was entered into between proper parties. So with respect to the subject of the contract.

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Without entering on the inquiry respecting the limits which may circumscribe the capacity of the United States to contract, I venture to say that it is co-extensive with the duties and powers of government. Every contract which subserves to the performance of a duty, may be rightfully made.

The Constitution, which has vested the whole legislative powers of the Union in Congress, has declared that the President "shall take care that the laws be faithfully executed." The manner in which a law shall be executed does not always form a part of it; a power, not limited or regulated by the words of the acts, has been given by the legislature to the executive, to construct fortifications; and large sums of money have been appropriated to the object. It is not and cannot be denied, that these laws might have been carried into execution by means of contract; yet, there is no act of Congress, expressly authorizing the executive to make any contract in the case. It is useless, and would be tedious, to multiply examples, but many might be given to illustrate the truth of the proposition. It follows, as a necessary consequence, that the duty, and of course the right, to make contracts may flow from an act of Congress, which does not in terms prescribe this duty; the proposition then is true, that there is a power to contract in every case where it is necessary to the execution of a public duty.(1)

(1) Since the above opinion was delivered, the question, whether a bond taken by the United States, for a lawful purpose, but not prescribed by any law, is absolutely void? has been twice carried before the Supreme Court of the United States, and in both instances the doctrine laid down by the Chief Justice has been fully sustained. In the *United States v. Tingey*, 5 Peters's Rep. 115, the Court held that "the United States, being a body politic, as an incident to their general right of sovereignty, have a capacity to enter into contracts, and take bonds in cases within the sphere of their constitutional powers, and appropriate to the just exercise of those powers, through the instrumentality of the proper department to which those powers are confined, whenever such contracts or bonds are not prohibited by law, although the making of such contracts, or taking such bonds, may not have been prescribed by any pre-existing legislative act. The court laid down this as a general principle only, without (as was then said) attempting to enumerate the limitations and exceptions, which may arise from the distribution of powers in the government, and from the operation of other provisions in our constitution and laws."

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It remains to inquire, whether it be indispensable to the validity of a contract, that it should express the circumstances under which it was made, so precisely and distinctly, as to show the motives which induced it, and the objects to be effected by it. This certainly is often done, and in many cases conduces to a clear understanding of the intention of the parties, and of the obligations which the instrument creates; but it is not universally practised, would be often inconvenient, and is necessary, I think, only so far as may be requisite to explain the nature of the contract. We know too well that persons entrusted with the public money, are often defaulters. It is not, I believe, doubted, that the law raises an assumpsit to pay the money which the defaulter owes. An overpayment is sometimes made by mistake; is not the receiver liable to the United States? Yet, there is no act of Congress creating the assumpsit in either case. I presume it will not be denied, that a declaration charging that the defendant was indebted to the United States, for money had and received to their use, and that being

But the Court, in applying the principle to the case then before them, further added: "We hold that a voluntary bond, taken by authority of the proper officers of the treasury department, to whom the disbursement of public moneys is entrusted, to secure the fidelity in official duties of a receiver, or an agent for the disbursement of public moneys, is a binding contract between him and his sureties, and the United States, although such bond may not be prescribed or required by any positive law. The right to take such a bond is, in our view, an incident to the duties belonging to such a department; and the United States having a political capacity to take it, we see no objection to its validity in a moral or a legal view."

"From the doctrine here stated, we have not the slightest inclination to depart: on the contrary, from further reflection, we are satisfied that it is founded upon the soundest principles, and the just interpretation of the Constitution. Upon any other doctrine, it would be incompetent for the government, in many cases, to take any bond or security for debts due to it, or for deposits made of the public money; or even to enter into contracts for the transfer of its funds from one place to another, for the exigencies of the public service, by negotiable paper or otherwise; since such authority is not expressly given by law in a vast variety of cases." Opinion of the Supreme Court in the United States v. Bradley, 10 Peters's Rep. 343. See also Dugan v. The United States, 3 Wheat. 172. (4 Cond. Rep. Sup. Ct. U. S., 223;) and the Postmaster General v. Early, 12 Wheat. 136. (6 Cond. Rep. Sup. Ct. U. S., 480.)—[Editor.]

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so indebted, he assumed and promised to pay it, would be sufficient without setting forth at large all the circumstances of the character in which, and the objects for which, the money was received. If the law would raise an implied assumpsit, which would be binding, I cannot conceive that an express assumpsit would be less so; nor can I conceive that such express assumpsit, more than the implied assumpsit, need detail the various circumstances on which its validity might depend. These would be matter of evidence. In any case where an assumpsit would be valid, the government may certainly take a bond, and I perceive no reasons why sureties may not also be demanded. It is the duty of the government to collect debts due to it, however they may have accrued; it results from this duty that the means of securing and collecting the public money may be used. Sureties may therefore be required to the bond demanded from the debtor; the instrument itself is an admission that it is given for a debt, and it is contrary to all our received opinions to require, that it should show how the debt was contracted. Any thing which destroys its validity may, undoubtedly, be shown in pleading; but a bond given to the United States, is, I think, *prima facie* evidence of debt, and would be sustained on demurrer.

So if money be committed to the care of any person for a legitimate object, bond and security on the same principle may be required, with condition that he shall account for it. The jurisdiction of a limited court must undoubtedly appear on the record; but I do not think that the same rule applies to contracts. Infants, femes covert, idiots, and persons under duress, are not bound by their contracts. But their disability must be shown by pleading, and it need not appear in any contract that the parties to it are not liable to these disabilities. Every contract which is legal on its face, and imports a consideration, is supposed to be entered into on valid consideration, and to be obligatory, if the parties be ostensibly able, until the contrary is shown; and the same rule applies to a government which is capable of making contracts.



2. It is also contended that this bond is void, because it is entered into on a consideration which is either forbidden by express law, or contrary to the general policy of the law.

The plea refers to the act passed on the 3d of March, 1809, "to amend the several acts for the establishment and regulation of the treasury, war, and navy departments." I have already said, that I do not consider the prohibition of this act as comprehending agents of fortifications, because they do not belong to the military establishment, nor do their employments relate to it. It is unnecessary to enter into any argument in support of this opinion, because it is of no importance to the point under consideration. The effect, if the act applied to the office, would be to show that the appointment of James Maurice to the office of agent of fortifications was not legal—and that effect is produced by the construction I have given to the Constitution. I consider the appointment of James Maurice to the office of agent of fortifications, by the secretary of war, as invalid; but the question, is the bond void on that account? still remains to be considered. It was undoubtedly intended as an office bond, and was given in the confidence that James Maurice was legally appointed to office. If the suit was instituted to punish him for the neglect of duty, in the nature of non-user, or for any other failure, which could be attributed in any degree to the illegality of his appointment, I should be much disposed to think the plea a bar to the action. But this suit is brought to recover the money of the United States which came to the hands of James Maurice, in virtue of his supposed office, and which he has neither applied to the purpose for which he received it, nor returned to the treasury. In such a case, neither James Maurice, nor those who undertook for him, can claim any thing more than positive law affords them.

The plea does not controvert, but must be understood to confess the material facts charged in the declaration. It must be understood to confess that the money of the United States came to the hands of James Maurice as agent of fortifications; that it was the duty of such agent to disburse it for the use of the

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United States, in the manner prescribed by the army regulations, or to account for it; that he has failed to do either, and that they were bound for him in this respect. Admitting these things, they say it is a bar to the action brought for the money, that his appointment was illegal.

If the bond contained no reference to the appointment of James Maurice, as agent of fortifications; if its condition stated only, that certain sums of money had been delivered to him to be disbursed under the discretion of the principal engineer, in the purchase of materials for fortifications, and in the payment of labourers, its obligation, I presume, would not be questioned. It would be a contract which the United States might lawfully make. If, instead of specifying the particular purposes for which the money was received, the condition of a bond refers to a paper which does specify those purposes, I know of no principle of reason or of law, which varies the obligation of the instrument from what it would be, if containing that specification within itself. That is certain which may be rendered certain, and an undertaking to perform the duties prescribed in a distinct contract, or in a law, or in any other known paper prescribing those duties, is equivalent to an enumeration of those duties in the body of the contract itself.

This obligation is an undertaking to perform the duties appertaining to the office of agent of fortifications. Those duties were prescribed in the army regulations, and were such as any individual might lawfully undertake to perform. The plea does not allege that the thing to be done was unlawful, nor does it allege that the illegality of the appointment to office constituted any impediment to a performance of the condition of the bond. Were it even improper to disburse the money received in the manner intended by the contract, it could not be improper to return it. There can be nothing unlawful in the engagement to return it. The obligation to return it, as in every other case of money advanced by mistake, is one, which, independent of all express contract, would be created by the law itself. So far as respects the receiver himself, he would be bound by law

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to return the money not disbursed, and if he would be so bound, why may not others be bound with him for his doing that, which law and justice oblige him to do?

Admitting the appointment to be irregular, to be contrary to the law and its policy, what is to be the consequence of this irregularity? Does it absolve the person appointed from the legal and moral obligation of accounting for public money which has been placed in his hands in consequence of such appointment? Does it authorize him to apply money so received to his own use? If the policy of the law condemns such appointments, does it also condemn the payment of moneys received under them? Had this subject been brought before the legislature, and the opinion be there entertained that such appointments were illegal, what would have been the probable course? The secretary of war might have been censured; an attempt might have been authorized to make him ultimately responsible for the money advanced under the illegal appointment; but is it credible that the bond would be declared void? Would this have been the policy of those who make the law? Let the course of Congress in another case answer this question.

It is declared to be unlawful for any member of Congress to be concerned in any contract made on the part of the United States, and all such contracts are declared to be void. What is the consequence of violating this law, and making a contract against its express provisions? A fine is imposed on the violator, but does he keep the money received under the contract? Far from it. The law directs that the money so received shall be forthwith repaid, and in case of refusal or delay, "every person so refusing or delaying, together with his surety or sureties, shall be forthwith prosecuted at law, for the recovery of any such sum or sums of money advanced as aforesaid." If, then, this appointment be contrary to the policy of the law, the repayment of the money under it is not, and a suit may, I think, be sustained, to coerce such repayment on the bond given for that purpose.

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The cases cited by the defendants, do not, I think, support the plea.

*Collins v. Blantern*, 2 *Wilson*, 341, was a bond given, the consideration of which was illegal. It was to compound a prosecution for a criminal offence. It was to induce a witness not to appear and give testimony against a person charged with the commission of a crime. The court determined that the bond was void, and that the illegal consideration might be averred in the plea, though not appearing in the condition. It is only wonderful that this could ever have been doubted.

The case of *Paxton v. Popham*, 9 *East*, 408, and the case of *Pole v. Harrobin*, reported in a note in page 416 of the same volume, are both cases in which bonds were given for the payment of money for the performance of an act which was contrary to law. These cases differ in principle from that at bar. The bond was not given to induce the illegal appointment, or for any purpose in itself unlawful. The appointment had been made, and the object of the bond was to secure the regular disbursement of, or otherwise accounting for, public money advanced for a lawful purpose. The bond was not then unlawful, though the appointment was.

The case of *Nares and Pepys v. Rolles*, 14 *East*, 510, was a suit on a bond given by a collector and his sureties, for the due collection and payment to the receiver-general, of certain duties assessed under an act of Parliament. The duties were collected, but not paid to the receiver-general; in consequence of which, the collector was displaced, and suit brought against one of the sureties in the bond. The defence was, that the duties were not in law demandable, and this defence was founded on an ambiguity in the language of the act. The argument turned chiefly on the words of the statute, but the counsel for the plaintiffs contended also, that supposing the act not to impose the taxes, yet the bond would not be void, for such a security might well be taken, that the duties which were actually collected should not be lost, but might be preserved, to be paid

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over to those who should be found ultimately entitled to receive the money. It was competent for him to enter into a bond to pay over voluntary payments made to him, although he might not have been able to enforce payment of the rates, from those who might refuse.

In answer to this argument, it was said, that unless the act gave authority to assess and collect the duties, he was no collector, and could not be subject to any obligation for not paying money over to the plaintiffs, in that character, which was obtained by extortion.

The Court seemed inclined to this opinion, but determined that the taxes were imposed and assessed according to law, and therefore gave judgment for the plaintiffs.

The impression which may, at the first blush, be made by this case, will be effaced by an attentive consideration of it. If the money collected was not due by law, the plaintiffs could have no right to receive it, and had, consequently, no cause of action against the defendant. The money sued for was not their money, but the money of the individuals from whom it had been unlawfully collected. The bond to collect and pay over this money to the receiver-general, was a bond to do an unlawful act. The contract would have been clearly against law. In giving his opinion on this subject, the chief justice said: "Looking at the condition of this bond, as it appears upon the record, I cannot say that if the rates were collected without any authority, the collector could be called upon to pay them over, because he would be answerable to the individuals from whom he had received the money, and would be entitled to retain it for his own indemnity."

The case at bar is, in principle, entirely different from that of *Nares and Pepys v. Rolles*. This is not money obtained illegally from others, and, therefore, returnable to them, but is the money of the United States, drawn out of the treasury. The person holding it is not entitled "to retain it for his own indemnity," against the claims of others, for there are no others who can claim it. The justice of the case requires, I think, very

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clearly, that the defendants should be liable to the extent of their undertaking, and I do not think the principles of law discharge them from it.

I am therefore of opinion that the demurrer to this plea ought to be sustained, and that judgment on it be rendered for the plaintiffs.

# **Circuit Court of the United States.**

**VIRGINIA, NOVEMBER TERM, 1823.**

**BEFORE**

**Hon. JOHN MARSHALL, Chief Justice of the United States.**

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**MAXWELL ET AL. V. CALL, Executor of MEANS ET AL.**

A testator devises his estate to his four brothers and sisters, and to their children; but if "they should all die without leaving any issue of the body of either of them alive at the time of the death of the survivor of them; or if such issue should all die before attaining the age of twenty-one years aforesaid, then I desire, &c." The term *issue* comprehends as well the more remote descendants as the children of the devisees, and, consequently, the remainder over is too remote, being limited to take effect on a contingency which may not happen during a life in being, and twenty-one years afterwards.

THE opinion of the Court presents a statement of the material facts:

MARSHALL, C. J.—This suit is brought on the chancery side of this Court, for one moiety of the residuary estate of Robert Means, deceased, which the plaintiffs claim under his will. The testator directs his whole estate to be sold, and the proceeds to be invested in stock, at the discretion of his executors. After

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several legacies, he directs the residue to be divided into four equal parts, and gives the dividends or interest of one of the said parts to his sister, Nancy Maxwell, during her life, and after her death, he gives the principal of the said fourth part to all and every of the children of the said Nancy Maxwell who may attain to the age of twenty-one years. In case of infancy, the children to be maintained on the dividends; but if the said Nancy Maxwell should die without leaving any issue of her body alive at the time of her death, or all such issue of her body should die before attaining to the age of twenty-one years, then he gives the principal of the said fourth part in the same manner, and to the same persons, as the other three-fourths are given. The other three-fourths are given—one to his brother, William Means, for life, and afterwards to his children; one to his brother, George Means, for life, and afterwards to his children; and the other to his sister, Elizabeth Means, for life, and afterwards to her children, in the same words as are used in the bequest to Nancy Maxwell and to her children. Then comes the following clause: "But if the said Nancy Maxwell, William Means, George Means, and Elizabeth Means, should all die without leaving any issue of the body of either of them, alive at the time of the death of the survivor of them, or if such issue should all die before attaining the age of twenty-one years, as aforesaid, then I desire the said stock to be divided into three equal parts, to be disposed of as follows, &c."

Nancy Maxwell, in the will mentioned, is dead, leaving the complainant, W. M. Maxwell, her only child, who has attained his age of twenty-one years. George and William Means died intestate, and without issue, in the lifetime of Nancy Maxwell. Elizabeth Means intermarried with William Ker, who is since dead. She is a plaintiff in the bill, and the infant plaintiff, Robert Ker, is her only child.

The complainant, William M. Maxwell, claims two-fourths of the said stock, and prays that a moiety of the lands may be conveyed to him, instead of its remaining in the hands of the executor, to be sold as directed in the will. He contends that,



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on his attaining his age of twenty-one years, and the death of his mother, his rights became absolute by the happening of the contingency on which the legacy was to vest, and that he is also entitled to one moiety of the shares of George and William Means immediately, and to the whole property, should Elizabeth then die without leaving any child alive, or should that child die before attaining his age of twenty-one years. If this be not the proper construction of the will, he insists that the limitation over is too remote, and therefore void.

The executor resists this claim, and contends that the limitation over is not too remote, and that nothing vests absolutely in the legatees until the death of Elizabeth Ker, who is the survivor of the four legatees for life.

Considering the bequests to the children of each of the testator's brothers and sisters separately, without taking into view the effect which the ultimate limitation in remainder may have on them, it is very clear that the portion allotted to the children of Nancy Maxwell, would vest absolutely in the plaintiff, William M. Maxwell. His mother is dead; he is her only child; and he has attained his age of twenty-one years. The contingencies mentioned in this part of the will have all happened, and the title of William M. Maxwell to one-fourth of the fund is complete, so far as it depends on this part of the will.

The legacies to the children of George and William Means can never take effect, they having both died without issue. It becomes, therefore, necessary to inquire, whether the two-fourths devised to the children of these two brothers be disposed of during the life of the survivor of the testator's sisters, in the clause which gives the whole property over, if there be no issue of any of the brothers and sisters living when that event takes place, or whether there be an intestacy for that time. And in making this inquiry, the Court will also consider the influence which this clause may have on the preceding bequests.

The words are: "But if the said Nancy Maxwell, George Means, William Means, and Elizabeth Means, should all die

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without leaving any issue of the body of either of them alive at the time of the death of the survivor of them, or if such issue should all die before attaining the age of twenty-one years, as aforesaid, then I give the said stock, &c."

It is very clear, that this limitation over must take effect with respect to the whole property at the same time, and on the happening of the same event. No interest can vest in the remainderman under this clause, in the stock devised to the children of George and William, until it also vests in the stock devised to Nancy Maxwell and Elizabeth Means. It is entirely unimportant whether these words create cross remainders among the four families of the legatees until the death of the survivor, and the happening of the contingency on which the ultimate limitation is made to depend, or the testator is intestate until that contingency happens, with respect to those two-fourths, because the property passes for that time to the plaintiffs under either construction. The real and only inquiry is, as to the effect of the last clause on the whole of the property in any event which can now happen.

The interest is given to Nancy Maxwell for her life; the principal is given to such of her children as may attain to the age of twenty-one years. If the clause stopped here, the remainder would vest in any child who should attain the age of twenty-one, to open and let in others who should afterwards attain that age. The will proceeds: "But if the said Nancy Maxwell should die without leaving any issue of her body alive at the time of her death, or all such issue of her body should die before attaining to the age of twenty-one years," then the property is given over.

The word issue is known to comprehend, in its usual sense, all issue to the latest time. Nancy Maxwell is not dead without issue of her body, although she may have no child living, so long as any of her descendants in the direct line remain. Is there any thing in this will to confine the meaning of the term to children? I think there is nothing. The will is penned with great attention to technical language, and it is not to be pre-

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sumed that technical terms are used without a knowledge of their meaning, and an intention to use them in their legal sense. The term "children" is abandoned in this part of the will for "issue," because the latter word conveyed the meaning of the testator. If he intended that, if Nancy Maxwell should have children who should die under twenty-one, leaving children, those last mentioned children should represent their parent, and take the property given to her, he has used the very words which would produce that effect. No intent is discovered by the words of the will, or in the relations of the parties, to alter the legal construction of these words.

I proceed next to consider the last clause. "But if the said Nancy Maxwell, George Means, William Means, and Elizabeth Means, should all die without leaving any issue of the body of either of them alive at the time of the death of the survivor of them, or if such issue should all die before attaining the age of twenty-one years, as aforesaid, then I desire, &c."

The word "issue" is unquestionably used in this clause in the same sense in which it is used in the particular bequests to the children and families of each of his brothers and children. If, on the death of the survivor of his brothers and sisters, there should be no child of either of them living, but should be grandchildren, they would not all be dead without issue, and the remainder would not take effect. The only difficulty I have ever felt in the case remains to be considered. It depends on the meaning of the words, "if *such* issue should all die before attaining the age of twenty-one years." Does the word "*such*" restrict the issue which may take to those which are living at the death of the survivor, or may the issue of such issue take? If, for example, on the death of Elizabeth Ker, the survivor of the testator's brothers and sisters, the issue of all of them should be under the age of twenty-one years; if no one of the issue then living should attain the age of twenty-one, but should leave issue that do attain that age, would such issue take? Or would the property pass to those in remainder? According to a literal interpretation of the words, it would pass to those in remainder;

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but I think the will discloses enough to show that this was not the intent of the testator.

Three of his brothers and sisters had no children, certainly, at the date of the will. The testator, therefore, could have no affection for them, but as the descendants of his brothers and sisters. In this view, his desire to provide for them would extend to the whole family, and not be limited to their children, or to such issue as might happen to be living at the death of the survivor, to the exclusion of those who might be born afterwards. He obviously prefers all the descendants of his brothers and sisters to the more remote relations who are the remaindermen. To provide for those descendants, *per stirpes*, is his primary object. The provision for the more remote relations, is postponed till the extinction of the issue of his brothers and sisters. This primary intent, I think, though with some doubt, must prevail, and if all the issue alive at the death of the survivor should be under age, and should die under age, leaving that issue, I think such issue would take. If I am correct in this, the remainder is too remote, because it is limited to take effect on a contingency which may not happen during a life in being, or twenty-one years afterwards.

If I am correct in this, the plaintiffs are entitled, and I perceive no objection to directing a conveyance of the lands, instead of leaving them to be sold by the executor, it being understood, that the terms on which such conveyance shall be made, are adjusted between the parties.

## MANKIN, Assignee of WALSH v. JOHN CHANDLER &amp; Co.

Before Hon. JOHN MARSHALL, Chief Justice of the United States.

Where process is to be served on the thing itself which is the subject of controversy, and where the mere possession of the thing itself by the service of that process, and making proclamation, authorizes the Court to decide upon it without notice to any individual whatever, it is a proceeding *in rem*, to which all the world are parties, and in every such case, the decree is conclusive evidence against all parties interested, though not brought before the Court by process. But a *foreign attachment* (under the law of Virginia, see R. C. of 1819, ch. 123, p. 474), is not a proceeding *in rem*. It is a suit by a plaintiff against defendants, and a decree in such a case is conclusive evidence only against parties and privies. Thus, C. being indebted to W., gave his note for the amount, and W. assigned the note to M., and W. afterwards left the country. R., a creditor of W., attached the effects of W. in the hands of C. C. had notice of the assignment of his note to M. A decree was rendered in favour of R. M. subsequently brought suit upon the note against C., but the decree was satisfied before service of the process in the second suit. C. pleaded the decree in favour of R., in bar of M.'s right of action, and to this plea, M. demurred. The Court sustained the demurrer, on the ground, that a decree rendered in a suit between two parties, is not admissible evidence in a suit between one of those parties and a third party. But the Court held, that if M. had been a party to the first suit, the decree would have operated a bar, and the demurrer would have been overruled.

MARSHALL, C. J.—This is an action of debt, brought by the plaintiff, as assignee of — Walsh, on a note given by the defendants to Walsh on the 10th of October, 1818.

The defendants plead in bar, a decree made by the county court of Westmoreland, sitting in chancery, in a suit brought by Thomas Rowand, a creditor of the said Walsh, against the said Walsh and the defendant John Chandler, to attach the effects of the said Walsh in the hands of the said Chandler, and subject them to the payment of the debt due from Walsh to Rowand. The record of the proceedings in that suit, forms a part of the plea, and shows that the note was assigned anterior to the answer of the defendant, and that he had notice of the assignment. The decree directs the defendant, John Chandler,

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to pay to Thomas Rowand, out of the note given by John Chandler & Co. to Walsh, the sum which was shown to be due from Walsh to Rowand; and the decree was enforced before the service of process in this cause.

To this plea the plaintiff has demurred, and the defendants have joined in demurrer.

It is admitted that the decree of the county court of Westmoreland is erroneous, and would, unquestionably, be reversed if carried before a superior tribunal. But this Court can take no notice of its errors. While it remains in force, it binds the subject as conclusively as it would do, had it been affirmed in the highest court in the country. The question is, can it affect the rights of the plaintiff in this cause? for if it can, it concludes them.

In support of the demurrer, it is argued, that this decree cannot be given in evidence in this cause, as the plaintiff is neither a party nor a privy, it not being alleged that the assignment, or notice of it, was subsequent to the attachment.

The rule relied on by the plaintiff is familiar to every gentleman of the profession, and has not been controverted; but the defendant's counsel insists that this is a case to which that rule does not apply, because it is not within the ordinary jurisdiction of a court of chancery, but a case of which that court takes cognizance, by virtue of a statute, and is, in its nature, a proceeding *in rem*, and not *in personam*. It is, he says, a sentence on the thing itself, and not a decree against the person, and that in all cases of this description, the subject matter is bound by the sentence, and the title of those who are not particularly before the court, is as entirely decided, as the title of those who are. In support of this rule, he referred to the effect of decisions in the courts of admiralty, and in the court of exchequer, in England, which courts entertain suits *in rem*, to which all the world are said to be parties.

The principle on which the defendant relies, is as little to be questioned as that asserted by the plaintiff. The whole inquiry is, to which class of cases does that under consideration belong?

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What is the nature of a proceeding *in rem*? And in what does its specific difference from an ordinary action consist? Is every action in which a specific article is demanded a proceeding *in rem*? If it were, a writ of right which demands lands, of detinue which demands a personal chattel, would be a proceeding *in rem*, to which all the world would be parties, and by which the rights of all the world would be bound. But this, all know, is not the law. What, then, is the rule by which cases of this description are to be ascertained?

I have always understood that where the process is to be served on the thing itself, and where the mere possession of the thing itself, by the service of the process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever, it is a proceeding *in rem*, to which all the world are parties. The rule is one of convenience and of necessity. In cases to which it applies, it would often be impossible to ascertain the person whose property is proceeded against, and it is presumable that the person whose property is seized, is either himself attentive to it, or has placed it in the care of some person who has the power, and whose duty it is, to represent him and assert his claim. Such claim may be asserted; but the jurisdiction of the court does not depend on its assertion. The claimant is a party, whether he speaks or is silent; whether he asserts his claim or abandons it.

Thus, in the case of *Scott v. Shearman and others*, 2 W. Blackst. Rep., 977, which was an action of trespass against the officer who had seized goods which were condemned in the court of exchequer, Judge Blackstone says, "the sentence of condemnation is conclusive evidence in a case in which no notice was given to the owner in person, who was not a party to the suit, because the seizure itself is notice to the owner, who is presumed to know whatever becomes of his own goods. He knew they were seized by a revenue officer. He knew they were carried to the king's warehouse. He knew, or might have known, that by the course of law, the validity of that seizure would come on to be examined in the court of exchequer, and

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could be examined nowhere else. He had notice by the two proclamations, according to the course of that court. He had notice by the writ of appraisement, which must be publicly executed on the spot where the goods were detained. And having neglected this opportunity of putting in his claim and trying the point of forfeiture, it was his own *laches*, and he shall for ever be concluded by it." But in every case where parties are necessary to give the court cognizance of the cause, the decree, the judgment, or the sentence, binds those only, (with some few exceptions standing on particular principles), who are parties or privies to it. If a party is necessary, it follows that the party should be one who has the real interest; and to secure this, the interest of persons who are not parties cannot be affected. This is understood to be as true with respect to cases in the courts of admiralty and of the exchequer, as in courts of common law and chancery. If a case be cognizable in either of those courts, in consequence of the seizure which vests the possession, and of a general proclamation of that fact, every person is a party to the proceeding, and his interest is bound by the sentence; but in a case in which the law requires that parties should be brought before the court, the sentence binds those only who are parties.

If this be the rule, it remains only to examine the act of assembly which gives this remedy, in order to ascertain its character.

The law enacts,<sup>(1)</sup> that "if in any case which hath been or shall hereafter be commenced, for relief in equity in any superior court of chancery, or in any other court, against any defendant or defendants, who are out of this country and others within the same, having in their hands effects of, or otherwise indebted to, such absent defendant or defendants, or against any such absent defendant or defendants, having lands or tenements within the commonwealth, and the appearance of such absentees be not entered, &c.," "in all such cases the court

(1) See Revised Code (of Virginia) of 1819, ch. 123, p. 474.—[Editor.]



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may make any order, &c." The act then proceeds to make publication equivalent to service of the process, so far as is necessary to enable the court to decree in the cause.

The process, then, given by the act of assembly in the particular case, is not against the thing, but the person. It is in a suit brought against a defendant not residing in the country, and having effects within it, that this proceeding is allowed; and of course, the foreign defendant must be named in the subpoena and in the bill. The questions to be decided by the court in every such case are—is the foreign defendant indebted to the plaintiff, and are the attached effects his property? The plaintiff must establish both of these facts, and the defendants may controvert them. It is, then, a case which, by the very words of the law, is a suit between parties by which the rights of the individuals before the court are to be examined and determined. The law substitutes publication for service of process on the absent defendant, which shall give the court jurisdiction over the cause, and enable it to make a decree for the payment of the debt, which is chargeable on his effects in the hands of the garnishee. No reason can be assigned why this decree should bind a person who is not a party nor privy to it, which does not apply to every case. No reason can be given for the rule which does not apply to this case.

It is, we are told, excessive oppression that a court of justice should decree a man to pay a sum of money, and after enforcing its decree, compel him to pay the money a second time to another person. This is admitted; but it is also oppression to decree the money of A. to B.; every illegal and unrighteous judgment of a court is oppression. The law presumes no such judgment to be given; but if it be given, the law deems it more reasonable that the loss should fall on a person who was a party to the suit, who could assert his rights and controvert the decision, than on him who was not a party to it, and who had no opportunity of controverting it. Had Mankin been a party to the suit in Westmoreland county court, the decree would have bound him, had it been as iniquitous as it now appears to

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be; but not being a party, the rule of law protects him from its operation.

It has been truly said, that our law respecting foreign attachments, is founded on the same proceeding in London, which is established by custom. Some inconsiderable difference exists as to the manner of proceeding against the absent defendants, which has no bearing on the question arising in this case; as to that question, the law is the same. The case of *M'Daniel et al. v. Hughes*, 3 East, 367, goes fully into the law on this subject; in that case, as in this, a decree of the court was pleaded in bar to an action brought by the foreign defendant himself against his debtor, and in that case, too, a demurrer was filed to the plea. It was contended in argument, "that three parties are necessary in a foreign attachment—the plaintiff, the defendant, and a garnishee. The plaintiff must prove his debt, the defendant must have due notice of the process against him, and the garnishee must be in actual possession of the defendant's property which is to be attached." The law, as laid down for the plaintiff, was not controverted; but it was insisted that, according to the custom, the return of *nil* authorized the attachment; and of this opinion was the court, and for this reason the demurrer was overruled. The person who claimed the property was in that case a party to the suit, and such proceedings were had against him as, according to the custom, authorized the court to pronounce judgment in the case. He was precisely in the same situation as the plaintiff in this case would have been, had he been named as a defendant in the subpoena, and been included in the publication. Had this essential circumstance been wanting in the case of *M'Daniel v. Hughes*, it is apparent from the whole report, that the demurrer must have been sustained.

Upon the best examination I have been able to make of the cases which have been cited, as well as upon principle, I am perfectly satisfied, that a foreign attachment is not to be considered as a proceeding *in rem*, but as a suit by a plaintiff against defendants, and that a decree in such cases is within

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the general rule of being conclusive evidence only against parties and privies. The demurrer, therefore, is sustained.(2)

(2) In *Kelso v. Blackburn*, 3 Leigh, 306, Carr, J., said, that "the proceeding by foreign attachment, against absentees, was an innovation upon the common law; a proceeding *in rem* founded on the necessity of the case, lest there should be an absolute failure of justice, and like all *ex parte* proceedings, it was liable to great abuse, unless carefully watched and strictly confined to the ground covered by the law. It was not under their general jurisdiction that courts of equity took cognizance of those cases, but under particular statutes; and these, it would be found, had, with special care, marked out the extent and described the manner of the proceeding." It is very apparent, from an examination of the case of *Kelso v. Blackburn*, that Judge Carr did not intend to say, that the proceeding by foreign attachment, in Virginia, was, in the strictest sense of the term, and to all intents, a proceeding *in rem*, but simply that it was in the nature of a proceeding *in rem*. The question in that case was, whether the essential circumstance of the non-residence of the debtor was set forth with sufficient distinctness in the complainant's bill, the foundation of the jurisdiction of the court being the non-residence of the debtor, and his having effects in Virginia. If, because cognizance of the proceeding in foreign attachment was not taken by courts of equity, by virtue of their "general jurisdiction," but under "particular statutes," and because it was "liable to great abuse," the proceeding should be "carefully watched and strictly confined to the ground covered by the law," it is clear that the judge did not intend to lay down the general proposition in a sense which would abolish the familiar rule of evidence, that judgments or decrees are only evidence against parties and privies, in a sense which would give a decree in a proceeding by foreign attachment, a more extended operation against third persons than an ordinary decree of a court of equity. It is most obvious, that the learned judge, in speaking of the liability to abuse, in the proceedings by foreign attachment under an act of assembly, "*like all other ex parte proceedings*," had reference to the absent defendant himself (and to none other), against whom, from the very necessity of the case, the law was compelled to substitute the *formal and constructive notice by publication*, for the *actual service of process* required in the case of *home* defendants.—[Editor.]

## Circuit Court of the United States.

VIRGINIA, MAY TERM, 1824.

### REPORT

HON. JOHN MARSHALL, Chief Justice of the United States.

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JAMES HOPKIRK, Surviving Partner of SPIERS, BOWMAN & Co. v. ARCHIBALD CARY RANDOLPH, Administrator of THOMAS RANDOLPH, deceased, the said ARCHIBALD CARY RANDOLPH, in his own right, ISHAM RANDOLPH, THOMAS RANDOLPH, RANDOLPH HARRISON, and MARY his wife, and JOHN WILLIAMS, Administrator of JOHN BOWMAN, deceased.

It is a general principle, that a voluntary conveyance, made by a person indebted at the time, is void as to the creditors whose debts existed when the gift was made. But, though the fact of the donor's being indebted at the time of such voluntary conveyance, is a strong badge of fraud, yet where the donor's fortune was ample, and a gift made by him to his daughter at her marriage was comparatively trivial, and the husband received and retained possession of the subject of the gift; though the donor afterwards became insolvent, the Court refused to set the gift aside as fraudulent; a reasonable advancement, made under such circumstances, not being embraced by the statute of frauds.

*Quere*, How far the intervening marriage of the daughter would affect such a question, as between the creditors of the donor, and the husband of the daughter? Would the subsequent or contemporaneous marriage of the daughter render

## Hopkirk v. Randolph et al.

valid a gift which, independent of that marriage, would be void as to the antecedent creditors of the donor? It seems, that if the gift could be considered, in any fair construction, as the *inducement* to the marriage, the marriage would give validity to a gift, which, otherwise, would be void as to the creditors.

A father conveys a large portion of his estate to his sons, without valuable consideration, and directs that they shall execute bonds for a specific sum to a third person, the husband of the donor's daughter. This is virtually a charge upon the property, and is to be considered as if it was a gift from the father to his son-in-law directly, and the latter is liable to the creditors of the father, for any moneys received by him in satisfaction of such bonds.

T. R. being possessed of a large estate, made a division of it among his three sons, A. C. R., I. R. and T. R., and in consideration thereof, directed them to execute their bonds to R. H., the husband of the donor's daughter, for £250 each. J. B. obtained a judgment against T. R., the elder, after the division of his estate. Execution on the judgment was stayed, the plaintiff entering into an agreement with A. C. R., whereby it was stipulated that A. C. R. should pay the debt in three annual instalments. T. R., the elder, and his three sons, all became insolvent before the payment of the said debt. *Held*: That the stay of execution does not discharge R. H. from his liability to pay to the creditor any money received by him in payment of the bonds, although, when the judgment was rendered, A. C. R. possessed sufficient property to satisfy it. The principle, that where any indulgence is extended by a creditor to his debtor, and the debtor subsequently becomes insolvent, the creditor loses his recourse against the security, does not apply in favour of a mere *donee*.

*It seems*, that where a father executes a voluntary bond to his son-in-law, the obligee will not be held responsible to the prior creditors of the father, for the money actually received in payment, in whole or in part, of the bond, such voluntary bond not being within the statute of frauds.

If several voluntary conveyances are made to different individuals, which are fraudulent as to creditors, the donees will not be held liable, *only* for the proportions which their respective gifts bear to the debts of the donor, but the *whole* of every such gift will be subjected to the payment of the debts of the donor.

T. R. conveyed lands to his three sons, without valuable consideration, who conveyed them away to third persons. *Quere*, Are the lands in the hands of a purchaser liable to the claim of a creditor of the father? However this may be, the creditor cannot be compelled to proceed against such purchaser, and no decree would be rendered against him, in aid of a volunteer, who was able to pay the debt.

MARSHALL, C. J., delivered the following opinion, which presents a full view of all the material facts :

In the year 1790, the defendant, Randolph Harrison, inter-

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married with the defendant Mary, daughter of Thomas Randolph, deceased, who was then in possession of a maid-servant, a negro girl, and a riding-horse, which had been given her some years before by her father, who was at the time of the gift and of the intermarriage, possessed of a considerable estate. This property was, upon the intermarriage, retained by the donee, and has ever since remained in possession of Randolph Harrison. In the autumn of the year 1793, Thomas Randolph and his three sons, Archibald Cary, Isham, and Thomas, agreed on a division of his estate, and property to a large amount was conveyed to each of the sons, in consideration of love and natural affection, of certain specific debts, and also of bonds for £250, payable by each of them to their sister Mary Harrison.

In the year 1795, John Bowman, styling himself surviving partner of Spiers, Bowman & Co., instituted a suit in this Court against Thomas Randolph, and in May, 1796, obtained a judgment by confession for the debt in the declaration mentioned, to be discharged by the payment of \$1,532 46, with interest at the rate of five per cent. per annum, from the 1st day of September, 1775, till paid, with costs. Execution on this judgment was stayed, and the judgment was to be discharged in equal instalments of one, two, and three years. Archibald Cary Randolph, who transacted his father's business, made the agreement for the confession in his father's name, and engaged to pay the judgment according to its terms. To obtain his undertaking for the payment of the judgment appears to have been the principal motive with the plaintiff's agent for suspending execution.

On the 25th of June, 1800, a *fiery facias* was issued, which was returned "no effects." Archibald Cary Randolph had wasted and misapplied the estate and crops of his father.

In 1800 or 1801, Thomas Randolph departed this life, intestate, and in the year 1803 James Hopkirk, stating himself to be the surviving partner of Spiers, Bowman & Co., filed his bill in this Court, making Archibald Cary Randolph administrator of Thomas Randolph, deceased, and the said Archibald Cary Ran-

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dolph, Isham Randolph, and Thomas Randolph, and Randolph Harrison, and Mary his wife, children and distributees of Thomas Randolph, deceased, defendants thereto. The bill alleges that the estate of Thomas Randolph was considerable; that the deeds to his sons are fraudulent; that his children are in possession of property which ought to satisfy his debt, and prays a decree against them in such proportions as the Court may direct, or such other decree as may be adapted to his case.

Several accounts have been taken, and in the progress of the cause, it appears that the estate of Thomas Randolph senior, is wasted, and that all his sons are notoriously insolvent. The plaintiff claims the whole debt from his son-in-law, Randolph Harrison, or so much thereof as can be satisfied out of the property he has received with his wife.

On the hearing, the Court was of opinion that the personal representative of John Bowman ought to be a party, whereupon the bill was amended, and John Williams, administrator, &c. of John Bowman, deceased, was made a defendant, and his answer was filed, admitting the right of the plaintiff to the debt.

The defendant rests his defence on two grounds:—First, He contends that receiving a judgment with a stay of execution, with a stipulation that Archibald Cary Randolph would pay the debt, changes its character, and amounts to a waiver of his claim upon the property in the hands of Randolph Harrison. Secondly, That the gifts to Randolph Harrison are not within the statute of frauds. 1. The judgment is against Thomas Randolph senior, and appears by the record to have been confessed by his attorney; this was probably under the instructions of Archibald Cary Randolph; but Archibald Cary Randolph acted as his agent, and it is to be presumed, from all the circumstances, with full power. The judgment could not merge in the agreement with Archibald Cary Randolph, and was indeed a part of that agreement; it was not understood that Thomas Randolph was to be discharged, and Archibald Cary Randolph

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substituted in his place ; but that time was to be given to Thomas Randolph, in consideration of the collateral security furnished by the undertaking of Archibald Cary Randolph to pay the debt.

But the defendant insists that the plaintiff, by disabling himself from proceeding against Thomas Randolph, has discharged Randolph Harrison, upon the principle that the same act would have discharged a security of Thomas Randolph.

The two cases do not, in the opinion of the Court, stand on the same reason. The creditor who gives time to his debtor, hinders the security from proceeding himself against the debtor to recover the money he may have paid. But had Mr. Harrison paid this debt, he could not have recovered it from Thomas Randolph. A volunteer who loses the property given him from defect of title, has no legal recourse against the donor at any time, unless there be an express warranty. I am, then, of opinion, that the stay of execution, and the transactions with Archibald Cary Randolph, although the debt might certainly have been satisfied, had the creditor proceeded in the usual manner, constitute no bar to the present suit. They aggravate the hardship of the defendant's case, but do not constitute a defence at law, or in this Court.

2. I proceed, then, to the inquiry, how far the property which came to the possession of Randolph Harrison is liable to the creditors of Thomas Randolph ?

The words of the statute are, "every gift, &c., had, or made and contrived of malice, fraud, covin, collusion or guile, to the intent and purpose to delay, hinder, or defraud creditors of their just and lawful actions, &c. shall, from henceforth be deemed and taken (only, &c.) to be clearly and utterly void."

Were this statute now for the first time to be expounded, the Court would find much difficulty in construing it as directed against voluntary gifts or conveyances, merely because they were voluntary. The language of the act comprehends such as are made of malice, fraud, covin, collusion, or guile, with intent or purpose to delay, hinder, or defraud creditors. This



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intent or purpose, would be supposed to constitute the contaminating principle, which would infect and vitiate the gift or conveyance, and would be required to bring the particular case within the act.

But as this intent is concealed within the bosom of the actors, it would be the duty of the Court to infer it from the character of the transaction, and as the equity of the creditors is generally stronger than that of mere volunteers, the Court ought to lean to the side of the creditor, and to consider every gift or voluntary conveyance as coming within the statute, the fairness of which was not conclusively proved. Even, independent of the statute, gifts or voluntary conveyances, which obviously defeated the claim of a creditor, would be considered as fraudulent, so far as regarded him. The donee, therefore, would always be required to prove the fairness of his title. If he be not a purchaser for a valuable consideration, it would be incumbent on him to show a case, not only without taint, but free from suspicion. If the circumstances of the gift be such that, according to any reasonable probability, it might originate in any impure motive, or might in fact prove injurious to creditors, by withdrawing a subject to which they had just pretensions, the fair construction of the act would comprehend it. But a construction which should, under all circumstances, comprehend every gift, merely because it was voluntary, might derange the ordinary course of society, and produce much greater injustice than it would prevent. A man, for example, of great opulence, owing some debts, feels himself bound to advance his children, when they leave him to act for themselves, and to perform their own parts on the great theatre of the world. His own feelings and public opinion would equally reproach him, should he withhold from them those aids which his circumstances and their education and station in life would seem to require. A reasonable advancement, under such circumstances, so far from being considered as collusive, or made with an intent to defraud creditors, would be obviously a provision required by justice and the common sense of mankind. If, after a long lapse of time,

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the child, having acquired credit in virtue of the estate in his possession, and apparently his own, should, as well as his parent, become insolvent, all would admit that the equity of his creditors would be stronger than the equity of the creditors of his father. But should he not become insolvent, but should settle in life, marry in the visible possession of property given to him in good faith, as a reasonable provision made by an opulent parent, whose circumstances were not only unsuspected, but were in truth perfectly sound, the subsequent failure of that parent, at a distant period of time, could not reasonably be connected with that advancement, so as to impress upon it the stamp of fraud. No fraudulent intent, no intent to delay, or in any manner to injure creditors, could be inferred. The consequence could not be apprehended from the act, and, therefore, the act could not be considered as constructively fraudulent. It would seem to be a fair disposition of property, a fair exercise of the power of ownership; and not, I think, within the statute of frauds, were that statute now first to be applied to such a case.

But the statute has been long in force, and numerous decisions have been made upon it, both in England and in this country. Those decisions are admitted to bind this Court. They determine, that a voluntary gift is void as to creditors, whose debts existed at the time the gift was made. This is the general principle, and as a general principle, it is believed to be unquestionably a sound one. Untrammelled by precedents, this Court would, at this time and in this case, establish it. But the difference between a general principle, and one which is universal in its application, which is so inflexible as to permit no case to be withdrawn from it by any circumstances, however strong, which would make this act equivalent to an act annulling all gifts or voluntary conveyances, made by a person indebted at the time, however large his fortune, and however inconsiderable his debts or his gift, must be admitted by all. The extent of the principle, then, established by these decisions, must be ascertained by a review of the decisions themselves, of the terms in which they have been expressed, and of the circumstances to which those terms have been applied.

It has been truly observed that some shades of difference appear in the cases on this subject. Some judges have shown a disposition to press the principle farther than others, and have expressed themselves in terms more or less favourable to the creditor or donee.

Questions of this sort have been most common in chancery, but as courts of law have concurrent jurisdiction, and as they have received the same construction in both courts, it may be proper to notice the opinions that have been expressed by an eminent judge in a common law court. In the case of *Cadogan v. Kennett*, Cowper, 434, Lord Mansfield said: "These statutes (the stat. of the 13th and 27th Eliz.) cannot receive too liberal a construction, or be too much extended in the suppression of fraud. The statute of 13 Eliz. ch. 5, which relates to frauds against creditors, directs 'that no act whatever, done to defraud a creditor, shall be of any effect against such creditor or creditors;' but then, such a construction is not to be made in support of creditors as will make third persons sufferers. Therefore, the statute does not militate against any transaction, *bona fide*, and where there is no imagination of fraud. And so is the common law."

In the case of *Doe v. Routledge*, Cowper, 710, the same judge says: "A custom has prevailed, and leant extremely, to consider voluntary settlements fraudulent against creditors. But if the circumstances of the transaction show it was not fraudulent at the time, it is not within the meaning of the statutes, though no money was paid."

In the same case he afterwards says: "One great circumstance, which should always be attended to in these transactions, is, whether the person was indebted at the time he made the settlement? If he was, it is a strong badge of fraud."—(Page 711.)

The impression made by these declarations of Lord Mansfield is, that every gift made by a person indebted at the time, is liable to great and serious objection, and is, to use his own expression, a strong badge of fraud, but is not, necessarily, and under all possible circumstances, absolutely fraudulent.

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No English chancellor has leaned more to the creditors, in questions arising on these statutes, than Lord Hardwicke.

In the case of *Russell et al. v. Hammond et al.*, 1 Atkyns, 13, Lord Hardwicke said: "A great deal has been said on this head, but it depends on circumstances, and every case varies in that respect. There are many opinions that every voluntary settlement is not fraudulent: what the judges mean is, that a settlement being voluntary, is not, for that reason, fraudulent, but an evidence of fraud only.<sup>(1)</sup> Though I have hardly known one case where the person conveying was indebted at the time of the conveyance, that has not been deemed fraudulent."

This strong expression of opinion against voluntary settlements, made by a person indebted at the time, was used in a case where the relative value of the subject settled to the estate, and debts of the settler is not indeed stated, but where there is reason to believe that it was considerable. It was made, too, in a case where the settlement was in part supported, because it was made on a valuable consideration, and in part declared void, because it was made for the benefit of the settler himself. Trivial gifts, made without any view to creditors, with intentions obviously fair and proper, do not seem, from his language, to have been on the mind of the judge. It is observable, too, that he does not lay down the principle as being universal, but says, "he has hardly known one case where the person conveying was indebted at the time of the conveyance, that has not been deemed fraudulent."

In *Taylor v. Jones*, 2 Atk. 600, the master of the rolls said: "I look upon it as being a standing rule as to creditors for a valuable consideration, that it" (a voluntary settlement after marriage) "is always looked upon as fraudulent, and within the 13th Eliz. ch. 5." This expression is certainly a very comprehensive one; but it is applied expressly to a family settlement, not to an inconsiderable gift, and is used in a case in which the settler reserved to himself an interest for his life.

In the case of *Lord Townshend v. Windham*, 2 Vesey, Sen. 11,

(1) *Bovey's case*, 1 Vent. 193. *Lord Teynham v. Mullens*, 1 Mod. 119.

the chancellor said: "But I know no case on the 13th Eliz. where a man, indebted at the time, makes a mere voluntary conveyance to a child without consideration, and dies indebted, but that it shall be considered as part of his estate for the benefit of his creditors." This language is undoubtedly very strong, but it is used in a case in which the father had, by deed, in pursuance of a general power, appointed money to be raised for the benefit of his daughter. The case was, in substance, this:—Mr. Windham, being seised for life of a large estate, remainder to his nephew in tail, covenanted that his nephew should take the profits during his life, on his permitting any person whom Mr. Windham should appoint, by deed or will, to take the profits for the same length of time after the estate should come to the nephew. The testator, by deed, appointed that his daughter should take these profits, and it being determined that they were part of the general assets, the chancellor declared them liable to the claims of creditors. This language, therefore, is applied to a conveyance which is to take effect after the death of the testator. It may well be doubted whether the nephew could have been compelled to relinquish the profits received, had the conveyance to him been purely voluntary.

In the case of *Kidney v. Cousmaker*, 12 Ves. 136, the general doctrine that a voluntary settlement is void as to creditors, is again recognised; but that, too, was a settlement affecting a considerable portion of the property of the settler.

The books are full of cases in which the principle is acted on as one perfectly settled; but in all of them, so far as my researches have gone, there has been a conveyance of property to a considerable amount—some settlement of a thing still existing—or some bond or contract to be complied with in future. The case of *Partridge and Wife v. Goss et al.*, Ambler, 596, cited by the defendant, is a case of a gift of money; but that case is obviously founded on the actual fraudulent intent of the giver.

The suit was brought by the legatces of Edward Godfrey, against his executors, for an account of the personal estate of

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the testator, and to have a legacy of £6000 secured. An account was directed in 1736, and Joseph Sewell, one of the executors, was reported to be largely indebted. He was, in 1745, committed to the Fleet prison, for not complying with an order of court, directing him to pay into the bank £3000, part of the money in his hands, where he remained till 1750, when he died insolvent. The plaintiffs brought a supplemental bill against his children, four daughters, who had been advanced by Sewell in his lifetime. Two of the daughters were married, and the bill was dismissed at the hearing as to them, because the money they had received was given as marriage portions. The two remaining daughters were single, and stated in their answers, each of them, that she had received £500, in December, 1743, as a free gift for her maintenance and subsistence in the world. The chancellor took time to consider whether this money should be refunded. He says: "It struck me at first as a hardship to make the children refund, especially as such a gift could not be considered as a trust for the giver; but, on consideration, I think no man has such a power over his own property to dispose of it so as to defeat his creditors, unless for consideration. It is the motive of the giver, not the knowledge of the acceptor, that is to weigh. The statute extends to all cases except where there is good consideration, and *bona fide*; blood has been held not to be a good consideration. I have no doubt but that this voluntary gift proceeded from affection getting the better of justice." "It was done secretly and *pendente lite*." His lordship was asked, for the information of the bar, who thought he had laid down the position too broadly, whether he did not mean to confine it to the circumstances of the case? That, otherwise, a parent could not make any gift whatever, of ever so small value, to his child, without its being liable to be taken away in favour of creditors; to which he said: "that the fraudulent intent is to be collected from the magnitude and value of the gift." The idea of the bar that the chancellor had laid down the position too broadly, must have been founded on the words: "I think no man has such a power over his own proper-

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ty to dispose of it so as to defeat his creditors, unless for consideration." "The statute extends to all cases except where there is good consideration, and *bona fide*." These words, it was supposed by the gentlemen of the bar, would extend to any present whatever, of ever so small a value, a parent might make to his child. His lordship confines their application to gifts of magnitude and value. In the case itself, the gifts were of very great value, compared with the property of the giver, and were made under circumstances which exposed them, in an eminent degree, to the charge of being made for the purpose of defrauding creditors.

The case of *Chamberlayne v. Temple*, decided in the court of appeals (of Virginia, 2 Rand. 384,) is a case where a parent, much indebted at the time, disposed of a considerable portion of his property among his children, and afterwards died insolvent. It is true that he retained enough to pay his debts, and that his insolvency was produced by misfortunes and accident; but the property conveyed away was very considerable, and the most valuable part of that which he retained, consisted of vessels, and of the slaves who worked them. A circumstance, too, which is, I think, entitled to great consideration in that case, is, that the children were infants, residing with their father, so that the slaves given still remained in his possession. The gifts were not made to advance his children in the world, and it is difficult to conceive any motive for making them at the time, other than a desire to secure them for his children from the claims of his creditors. That case is a construction by the highest tribunal of our country of a statute of this state, and undoubtedly complete authority as far as it goes; but it does not, I think, go at all beyond the English decisions. I should not, I think, even before the case of *Chamberlayne v. Temple*, have hesitated to have determined such a conveyance to be fraudulent under our statute. It was a voluntary conveyance of a very large portion of the donor's estate, made by a person in embarrassed circumstances, to infants who were not at the time in need of any immediate provision, and who were not in a situation to take the property out of his possession.

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In the case of *Sexton v. Wheaton*,<sup>(2)</sup> the Supreme Court of the United States has said: "that in construing the statute of the 13th Eliz., the courts have considered every conveyance, not made on consideration deemed valuable in law, as void against previous creditors." This is a general proposition concerning the extent of the English divisions, not a decision of the Court itself declaring that every gift, however trivial, is at any distance of time, and under any circumstances, to be avoided by a creditor. The term "conveyance" indicates property of considerable value, as respects the situation of the parties, since it is chiefly in such cases that voluntary donations of personal chattels assume the form of conveyance. The general proposition was all which could be in the mind of the Court, since the case was one of a subsequent purchaser, and did not lead to any minute investigation of the distinctions which might possibly exist in cases of gifts made by persons indebted at the time. As a general proposition, it is unquestionably true. No voluntary conveyance of property has been sustained against creditors whose debts existed at the time, but no gift of such inconsiderable value as to come under the denomination of a present, made under circumstances entirely free from suspicion, has ever, so far as I am informed, been hunted up by a creditor, and claimed as a part of the donor's estate.

(2) 8 Wheat. 229; 5 Cond. Rep. Sup. Ct. U. S. 435, cited in 11 Wheat. 199; 6 Cond. Rep. Sup. Ct. U. S. 270. In this last case, the Supreme Court say, that "a deed from a parent to a child, for the consideration of love and affection, is not absolutely void as against creditors. It may be so under certain circumstances: but the mere fact of being in debt to a small amount would not make the deed fraudulent, if it could be shown that the grantor was in prosperous circumstances and unembarrassed, and that the gift to the child was a reasonable provision according to his state and condition in life, and leaving enough for the payment of the debts of the grantor. The want of a valuable consideration may be a badge of fraud, but it is only presumptive, and not conclusive evidence of it, and may be met and rebutted by evidence on the other side." See also *Ridgway v. Underwood*, 4 Wash. C. C. R. 129. *Gilmore v. The N. Am. Land Company et al.*, Peters's C. C. R. 460. See also the case of *Land v. Jeffries*, 5 Rand. 211, where the doctrine of fraud *per se* is very elaborately discussed.—[Editor.]



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I will now proceed to a particular consideration of the several items which constitute the subject of the present controversy.

The first is, the gifts made by Thomas Randolph to his daughter, prior to her intermarriage with Randolph Harrison, which, on the marriage in 1790, were taken into the possession of her husband as her property. These were two negro girls, one of them an attendant on her person, and a riding-horse.

Thomas Randolph was a gentleman of ample fortune, not embarrassed in his circumstances, nor so much indebted as to create any suspicion of difficulty in the payment of his debts. The idea cannot be admitted for a moment, that any apprehension concerning his creditors was, in any manner, connected with the motives to this gift. That of the waiting-maid and that of the riding-horse especially, are usual in this country, and come strictly, when made by a parent of unquestionable solidity, within that class of gifts which are denominated presents. They do not much differ from wedding-clothes, if rather more expensive than usual, from jewels, or an instrument of music, given by a man whose circumstances justified the gift. I have never known a case in which such gifts, so made, have been called into question. These gifts come, I think, completely within that class of presents, which, according to the case reported by Ambler, (p. 596, see *supra*), ought to be excepted from the general rule in favour of creditors. The gift of the other girl is not, I think, so perfectly clear; but I find great difficulty in separating it from the waiting-maid, both having been given with intentions perfectly fair, and both having passed together to the husband at the time of the marriage, and having remained in his possession ever since.

This case bears no resemblance to that of *Temple v. Chamberlayne*. If it did, I should not hesitate to follow the opinion of the court of appeals. But the distinction between them is too obvious to require that I should contrast them.

In the case of *Jacks v. Tunno et al.*, decided in S. Carolina, (3)

(3) 3 Desaussure's Rep. 1.—[*Editor.*]

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a trader, supposed to be in good circumstances at the time, though considerably in debt, purchased a house and lot, which was conveyed to the plaintiffs, his infant daughters. A few years afterwards he became bankrupt, and this bill was brought by the donees to restrain the defendants, who are not stated to be, but I presume were, the assignees of the bankrupt, from selling the property. The injunction was made perpetual; and, in giving his opinion, Chancellor Rutledge said: "Suppose, for instance, a person in this state being indebted, though to a considerable amount, is possessed of a large estate in houses in the city, gives a small part of that property to his child or children; or one, similarly circumstanced and indebted, possessed of a considerable estate in land and negroes, gives a few negroes and some land to his children, and either the accident of fire in the city, or the death of his negroes, should reduce his estate so considerably as to occasion his insolvency—would this court, under such circumstances, merely because the person was largely indebted at the time of the gift, consider such gift as fraudulent, and set it aside, because creditors were interested? I should apprehend not."

In the case of *Salmon v. Bennet*, 1 Connecticut Rep. 525, the court says, "where there is no actual fraudulent *intent*, and a voluntary conveyance is made to a child in consideration of love and affection, if the grantor is in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift is a reasonable provision for the child, according to his estate and condition in life, comprehending but a small portion of his estate, leaving ample funds, unencumbered, for the payment of the grantor's debts, then such conveyance will be valid against creditors existing at the time."

These cases are cited, not as having the authority which the decisions of our court of appeals would have in this Court, but as containing a great deal of good sense, and being entitled to great respect.

If the two girls and this riding-horse are to be considered as given before the marriage, so as to have become ostensibly the

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property of the young lady to whom they were given, there would be some difficulty, the perfect fairness of the gift being shown, in setting aside the rights of the husband. In the *East India Company v. Clavell*, Prec. in Chancery 377, Sir Edward Lyttleton, being appointed by the East India Company president at Bengal, entered into articles of agreement, on the 16th of January, 1698, for the faithful execution of the trust; and also gave his bond, binding his heirs in the penalty of £2000, conditioned for the performance of the covenant. Afterwards, on the 21st of the same month, he made a settlement on his daughter of £5000, to be raised out of land, and sailed for the East Indies. Some time after the departure of Sir Edward, Mr. Clavell made an application to the young lady in the way of marriage, and she placed the settlement in his hands. Being advised that it was valid, the marriage took effect, sometime after which Mrs. Clavell died without issue. Mr. Clavell administered on her estate, and brought his bill to have the money raised as directed by the settlement. Sir Edward Lyttleton had embezzled the effects of the company to the amount of £26,000, and they claimed this money, the settlement being voluntary.

The counsel for Mr. Clavell contended, that if the settlement was voluntary in its creation, yet being the motive and inducement to Mr. Clavell to marry her, this had now made it valuable.

The lord chancellor thought the settlement a reasonable provision, without colour of fraud. The articles did not bind the real estate, and the bond bound it only to the extent of the penalty. He directed the amount of the settlement, except as to the £2000, the penalty of the bond, to be paid to Mr. Clavell.

There is some difficulty in ascertaining the principle of this case. Most probably, the decision turned upon the point that the debt to the East India Company could not affect the subject out of which the £5000 were to be raised. Yet, in argument, the circumstance that the settlement might have influenced her marriage was considered important. I cite it, because

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it was mentioned in a subsequent case as deserving consideration on that account.

In *George v. Milbank*, 9 Ves. 190, the case was this. In July, 1797, Sir Ralph Milbank directed, by deed poll, that £500 should be raised immediately after his decease, out of certain trust premises, for the benefit of his natural son, George Milbank, and died in January, 1798. In February, 1798, George Milbank, in consideration of £400, assigned this money to Frederick Glenton and Thomas Peacock, subject to redemption on the payment of £400 with interest. The bill was brought by a specialty creditor of Sir Ralph Milbank, to subject this fund to his debt. The case was decided, as it respected the £400, in favour of Glenton and Peacock, because their equity being to the specific article, was superior to that of the general creditors. In the argument of the case, the case of the East India Company and Clavell was cited from Bacon's *Abridgment*. The lord chancellor said: "If the doctrine is rightly collected from the authorities, it imports all this: that if a man is indebted, and makes a provision for his child by a pure voluntary settlement, and that child afterwards marries, the circumstance of its leading to the marriage makes the settlement good against creditors, though it would have been bad if no marriage had taken place. I doubt whether it will not be found in the circumstances of that case, that the child was not a pure volunteer. If it can be supported, as here stated, it goes a great way to decide this case; for though this is the case of a stranger, it makes no difference between a voluntary settlement, made good by a subsequent marriage, and one made good by a subsequent advance of money."

Undoubtedly neither of these cases establishes the principle, that a subsequent marriage will make a voluntary settlement good, and yet the chancellor treats that point as if such subsequent marriage was not without its weight.(4)

(4) A voluntary deed of settlement to a child of the grantor is void, as against a subsequent *purchaser* for a valuable consideration (under the 27th Eliz.), with only *implied* notice of the previous deed, but any intervening valuable considera-

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If the gift was made at the time of the marriage, the claim of the husband will not be weakened by that circumstance. A reasonable gift, made contemporaneously with a marriage, and accompanied with a delivery of possession, has strong claims to being considered as a gift in consideration of the marriage. Where the circumstances of the party exclude the idea of any interference on the part of creditors, it is not usual to convey, by deed, property which passes by delivery, nor to use the solemnity of delivery expressly in consideration of marriage, although that may be the real consideration. I do not, however, place this case on that ground. I think a customary and inconsiderable gift from a parent to a child, which may properly be demonstrated a present, and which is free from all suspicion of an intention to defraud or injure creditors, cannot, if by subsequent mismanagement the estate of the parent be wasted, be considered as a fraudulent gift at common law or under the statute.

There was also a negro girl sent on the birth of Mrs. Harrison's first child. But this girl was sent as a present to the child.

In 1793 Thomas Randolph divided the greater part of his estate among his sons, stipulating that each of them should pay certain debts, and should execute a bond to Randolph Harrison for £250. Randolph Harrison took no part in this arrange-

tion will render the deed valid. As where the grantee in the voluntary deed gains credit by the conveyance, and a person is induced to marry her, on account of the provisions made for her in the deed, such conveyance, on the marriage, ceases to be voluntary, and becomes good against a subsequent *bona fide* purchaser for a valuable consideration. Nor does it matter whether any particular marriage was in contemplation at the time of the settlement or not. Kent, chancellor, in *Sterry and wife v. Arden et al.* 1 Johns. Ch. Rep. 261.

But a settlement after marriage in pursuance of a *parol* agreement entered into before marriage, is not valid: *aliter*, if the agreement was a *written* one, entered into prior to the marriage. And a voluntary *settlement* after the marriage, by a person indebted at the time, is fraudulent and void against *antecedent* creditors; and that, without regard to the amount of the existing debts, or the extent of the property settled, or the circumstances of the party. See Chancellor Kent's opinion in *Reade's Administrator v. Livingston et al.* 3 Johns. Ch. Rep. 481.—[Editor.]

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ment, but afterwards parted with the bonds to persons, and for a sum not mentioned in the proceedings.

The estates given by Thomas Randolph to his children, were of much greater value than the debts or money they were directed to pay, and no provision was made for the debt due to Spiers, Bowman & Co. Where a conveyance is made to children of property to a large amount, charged with debts bearing no proportion to its value, the children cannot be considered as purchasers of the whole, but must take the clear surplus value of the property as volunteers. With respect to this debt, for which no provision was made, such voluntary conveyance, according to all the cases, must be considered as fraudulent. But the property thus conveyed is wasted, and is beyond the reach of the creditor. How are the bonds given by the sons to be considered?

This question is not without its difficulties. They were given by the sons, in part payment for the property conveyed to them by their father, not to their father, but directly to Randolph Harrison. I have felt some doubt whether such bonds were within the statute, but upon the best consideration I can give the subject, the opinion I have formed, is, that as they are in fact the gift of the father to his daughter, they are in substance equivalent to a charge upon the property, conveyed to the sons, which charge would be as liable to creditors as the property itself. I therefore consider Mr. Harrison as liable for these bonds, but liable only for the amount actually received on them. Had they never been paid, it cannot be pretended that he would be accountable for their amount to the creditors. If it cannot, then he will, I think, be at liberty to show what was the amount actually received.(5)

(5) The defendant, Randolph Harrison, admits in his answer, that he had collected the bonds executed by the three sons of Thomas Randolph, but does not state the terms on which those negotiations were effected. The depositions filed in the cause, however, show that the bonds were, at a fair valuation, worth more than the amount of the debt due by Thomas Randolph, the elder, to the firm of Spiers, Bowman & Co.—[*Editor.*]

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The subject which remains to be considered, is the bond given to Mr. Harrison by Mr. Randolph himself.

Supposing this to be an obligation which bound Mr. Randolph to the payment of money, the question is, whether Randolph Harrison is liable for the money actually received upon it? I think the cases of *Stiles v. The Attorney General*, 2 Atk. 152; *Gilham v. Locke*, 9 Ves. 613; and *Berry, ex parte*, 19 Ves. 218, decide this question in the negative. They decide that satisfaction by bond, and I think, by payment, of what is due on a voluntary bond or conveyance, is not to be considered as a voluntary act within the statute.

If, then, this bond is to be considered as binding in its terms, I do not think Randolph Harrison accountable for the amount received upon it. If it is not binding, it is nothing, and Randolph Harrison can only be charged with the amount actually paid by Thomas Randolph, of which there is no evidence before the Court. It is, however, a subject into which an inquiry would be useless, because the bonds given by the three sons would, on any probable estimate of their value, exceed the amount of the debt due the plaintiff.

According to the former course of this Court, founded on what was supposed to be the course of the state courts, Randolph Harrison would be accountable only for such proportion of the debts of Thomas Randolph, as the property received by him bore to the property received by the sons. But that principle is completely overturned by the case of *Temple v. Chamberlayne*, and I conceive it as now settled, that the whole sum is liable to the claims of creditors. If it be, then the decree must be, that the defendant pay to the plaintiff the sum of \$3064 92; to be discharged by the payment of \$1532 46, the debt in the declaration mentioned, that being the amount of the judgment rendered in this Court against Thomas Randolph in favour of John Bowman, as surviving partner of Spiers, Bowman & Co., in May 1796.

*Note.*—Upon a re-argument of this case at the same term, the Chief Justice delivered the following opinion:

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MARSHALL, C. J.—A re-argument of this case having been granted at the request of the counsel for Randolph Harrison, it has been re-considered by the Court.

The argument has turned chiefly on two points: 1. That the whole estate conveyed to the sons, is chargeable with this debt. 2. That a gift of money by a parent to a child, not really made with a fraudulent intent, is not constructively fraudulent under the statute.

1. That the whole debt should be paid by the sons, were they now solvent, and before the Court, will be really admitted; but two of them are dead insolvent, and the third, who is now alive, is admitted to be insolvent. The creditor can receive nothing from that source.

It is insisted that the land is liable in the hands of the purchasers. Of this I am not confident; but were it to be admitted that a person who holds by purchase from a volunteer, takes the property subject to the creditors of the original donor, I should still be of opinion that the creditor would not be compellable to proceed against such purchaser, and I should also think that no decree could be made against him, in aid of a volunteer who was able to pay the debt.(6)

(6) *Eppes, &c. v. Randolph*, 2 Call, 183. The question how far purchasers from a debtor (or his voluntary grantee) are entitled to protection in a court of equity from the claims of the creditors of the grantor, has frequently been the subject of laborious investigation in our courts, and it may not be amiss here to present a brief review of some of the leading cases in which it has been discussed. The question depends upon the construction of the proviso in our Statute of Frauds, which declares that the act shall not extend to any estate or interest in any lands, goods, or chattels, or any rents, common, or profits out of the same, which shall be upon *good* consideration, and *bona fide*, lawfully conveyed or assured to any person or persons, bodies politic or corporate. 1 Rev. Code of 1819, p. 373, sec. 3. This is substantially the same proviso contained in the English statute of 13 Eliz. (Green, J., in *Garland v. Rives*, 4 Rand. 305), and the term *good* consideration has been interpreted to mean *valuable* consideration. (*Twyne's case*, 2 Co. Rep., part 3, p. 80. *Hodgson v. Butts*, 3 Cranch, 157. 1 Cond. Rep. Sup. Ct. U.S. 476.)

In *Eppes et al. v. Randolph*, the court of appeals (by Pendleton, president), "laid down this general proposition, that where a creditor takes no specific security from his debtor, he trusts him upon the general credit of his property, and a confidence



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2. It is true, that few cases are to be found in the books, in which a child has been decreed to refund money actually received from a parent. From the nature of the transaction, such gifts would not frequently be the subject of inquiry. Where they are inconsiderable in amount, they are seldom

that he will not diminish it to his prejudice. He has, therefore, a claim upon all that property whilst it remains in the hands of the debtor, and may pursue it into the hands of a mere volunteer: but not having restrained the debtor's power of alienation, if he or his volunteer convey to fair purchasers, they, having the law and equal equity, will be protected against the creditors." This proposition is cited and recognised as the true exposition of the doctrine by Coalter, J., in *Coutts et al. v. Greenhow*, 2 Munf. 368. And a grantee claiming under a deed made by his father (the debtor), in consequence of a marriage agreement between the fathers of the grantee and his wife, is a purchaser for valuable consideration, and not a volunteer. *Eppes v. Randolph*.

Under the proviso of the 13th Eliz., the purchaser, whether from the debtor himself, or his voluntary or fraudulent grantee, was protected, if he had not notice of the fraud of his own grantor; so that the *bona fides* was required only of the purchaser. And this is the just construction of the Virginia statute. *Green, J.*, in *Garland v. Rives*, 4 Rand. 305. But in the last case, the purchaser having had full notice of the fraud, and of the invalidity of the grantee's title, it was held: that upon general principles of equity, he could acquire no better right than they had; and upon the terms of the statute (13th and 27th Eliz., adopted in our code), he could not be protected as a *bona fide* purchaser, but must stand, to all intents and purposes, in the shoes of the grantees.

In *Coleman v. Cocke*, 6 Rand. 618, a father purchased land, and took, and retained for several years, possession as the beneficial owner thereof, but the purchase-money was not paid, and the lands were not conveyed to him; and when the purchase-money was paid, the father being greatly indebted, directed the vendor to make the conveyance to his son. The lands were accordingly conveyed to the son, no valuable consideration moving from the son, and the son sold them to a fair and *bona fide* purchaser, without notice of any fraud. The purchaser was held to be protected from the claims of the creditors of the father by the proviso in the statute.

From the above summary it is clear that the doctrine is firmly settled in Virginia, that a fair, *bona fide* purchaser, for valuable consideration, without notice, is entitled to protection from the claims of creditors, whether the purchase was from the debtor himself, or his voluntary or fraudulent grantee. Some discrepancy of opinion seems, however, to have prevailed between learned judges elsewhere on the construction of these statutes of the 13th and 27th Eliz. Thus, in *Roberts, &c. v. Andersons*, 3 Johns. Ch. Rep. 377, Chancellor Kent recognises the rule as set-

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made the subject of inquiry; and, were they even looked into, would, perhaps, not be deemed fraudulent; and where large advances are made, they most generally consist of money in the funds, or charged on lands; but in the case of Partridge v. Goss, reported in Ambler, a gift of money to a child was declared fraudulent as against creditors, and the chancellor founded his opinion on the magnitude and value of the gift. That case was, it is true, tainted with circumstances leading strongly to the opinion, that the gift was made for the purpose of providing for his family at the expense of a creditor, but the chancellor places his decree chiefly on the magnitude of the gift; the fraud was inferred, in a great degree, from that circumstance. In the case at bar, the gift to Randolph Harrison forms a part of a more considerable transaction, and cannot easily be separated from it. That transaction was the division

tled, that a purchaser for a valuable consideration, without notice, from a voluntary or fraudulent grantee, shall be preferred to a subsequent purchaser for valuable consideration, without notice, from the original grantor (under the 27th Eliz.). But in relation to the 13th Eliz., which was made to protect creditors from fraudulent conveyances, Chancellor Kent said that a different rule of construction prevailed: that the *proviso* in the act applied only to the *original conveyance*, and saved it, when made to a *bona fide* purchaser for a valuable consideration, however fraudulent the intent of the grantor might be, *but did not extend to a purchase, however fair, on the part of the purchaser, from the voluntary or fraudulent grantee*. Chancellor Kent concurred herein with the Supreme Court of Errors of Connecticut, in *Preston v. Crofut*, 1 Day's Rep. 527, in the construction of their Statute of Frauds, which, he said, "was substantially the same as the statutes of Elizabeth."

In *Bean v. Smith et al.*, 2 Mason, 252, Judge Story reviewed the cases of *Roberts v. Andersons*, and *Preston v. Crofut*, and expressed the opinion that the *proviso* in the statute applied to estates derived from the fraudulent grantee, precisely as it did to those derived from the fraudulent grantor; that the Statute of Frauds had been universally considered as an exposition of the common law, and he regarded his construction of the *proviso* as in accordance with the principles of the common law. Judge Story's construction is supported by the opinion of Chief Justice Parsons, in *Gore v. Brazier*, 3 Mass. Rep. 541, and that of Chief Justice Parker, in *Trull v. Bigelow*, 16 Mass. Rep. 418, 419, and seems to be supported by that of Judge Spencer, in the case of *Sands v. Hildreth*, 14 Johns. Rep. 498.

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of the estate of Thomas Randolph among all his children; though only a small portion was allotted to Randolph Harrison, that small part must, I think, partake of the character of the whole transaction. It would be very difficult to relieve this whole family arrangement entirely, from the taint of being made, at any rate, without sufficient regard to the claim of a creditor not provided for. It has been said at the bar, that there was a general promise on the part of the sons to pay any debts which might appear; but there is no proof of such promise; and had any debt, not mentioned in the conveyances, formed a part of the consideration, a stipulation to that effect ought to have been inserted. It has been said with some probability, that this debt was forgotten; but however satisfactory this excuse may be in an inquiry into the morality of the arrangement, it would be dangerous to admit it in an inquiry into its legality.

The cases of *Gilham v. Locke*, 9 Ves. 612, and *Berry, ex parte*, 19 Ves. 218, from which it is inferred, that money paid in discharge of a voluntary bond is not within the statute, rather support the opinion, I think, that money given in the first instance, not under the obligation of such bond, would be within the statute. The validity of such payment would not, I think, have been placed on the obligation which a voluntary bond creates between the parties, if the advance of the money, independent of such prior obligation, had been considered as beyond the reach of the statute.

This case is one of extreme hardship, which ought not to be carried beyond express authority; but I think myself bound to adhere to the decree in favour of the plaintiff.

# Circuit Court of the United States.

VIRGINIA, NOVEMBER TERM, 1824.

BEFORE

HON. JOHN MARSHALL, Chief Justice of the United States.

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## HOFFMAN v. PORTER.

The dismissal of a suit agreed does not amount to a retraxit, and is no bar to a future suit for the same cause of action.

A conveyance to "P. H. & Son," a mercantile firm, it *seems*, is a sufficient description of the son to enable him to take under the deed.

MARSHALL, C. J.—This suit is brought by John Hoffman, surviving partner of "Peter Hoffman & Son," against William Porter, to recover damages for the breach of covenants contained in a deed conveying land to "Peter Hoffman & Son."

The declaration states, that by a certain indenture, made the 10th day of April, in the year 1800, between William Porter the younger, and Polly his wife, of the one part, and Peter Hoffman & Son of the other part, which son is the said John, the plaintiff, they, the said William Porter the younger, and Polly his wife, in consideration of the sum of £ 1002 10s. current

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money of Virginia, conveyed to the said Peter Hoffman & Son, merchants and partners, a certain tract of land in the deed mentioned; and the said William Porter the younger, for himself and his heirs, covenanted to and with the said Peter Hoffman & Son, that they, the said William Porter the younger, and Polly his wife, had a good title to the premises, and that the said Peter Hoffman & Son might quietly enjoy the same; that the said Peter Hoffman had departed this life, and all his rights in the land and covenant survived to the plaintiff. The averment is, that the said William Porter, and Polly his wife, were not, at the date of the said deed, possessed of a good title to the said land, nor did the said Peter Hoffman & Son, in the lifetime of the said Peter, nor had the plaintiff since his death, enjoyed the same quietly; but in consequence of the defective title of the said William Porter the younger, and Polly his wife, the plaintiff has been molested, &c. in the enjoyment thereof.

The defendant cravedoyer of the deed, which is spread on the record, and appears to be a conveyance from William Porter, senior, and Margaret his wife, and William Porter, junior, and Polly his wife, of the land in the declaration mentioned, to Peter Hoffman & Son, of Baltimore. The covenants for good title and quiet enjoyment are, that the said William Porter, senior, and Margaret his wife, and William Porter, junior, and Polly his wife, have good title, and that the said Peter Hoffman & Son may quietly enjoy the premises.

The defendant pleads,

1st. That he was formerly impleaded for the same cause of action, which suit, by the judgment of the Court, the same being agreed by the parties, was dismissed.(1)

2d. That the covenants stated by the plaintiff in his declaration, were none of them made with the plaintiff.

He also demurs to the declaration.

The plaintiff demurs to the plaintiff's first plea, and the defendant joins in demurrer.

(1) This suit was originally brought in a state court, and was dismissed agreed.  
[Editor.]

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The validity of the plea depends on the question, whether the judgment rendered in the former action is a bar to a new suit?

The practice in the English courts furnishes no exact precedent for the case. The books mention a retraxit, a judgment of nonsuit, or a discontinuance. A retraxit only is a bar to a new action. This, I think, is not a retraxit. In a retraxit, the plaintiff openly renounces his action. In this case, some agreement is made between the parties for the termination of the existing suit, and the entry is made by the clerk without any exercise of judgment on the part of the Court. It is the mere act of this party, and, I believe, is not, in the common practice, considered as more than a dismissal of his suit by the plaintiff.(2)

But this demurrer to the plea, as well as the demurrer to the declaration, brings before the Court the validity of the declaration, and, consequently, of the conveyance which it sets forth.

The conveyance is to Peter Hoffman & Son, and this action is brought by John Hoffman, who states himself to have been the partner in trade of Peter Hoffman, and to have been the son intended in the conveyance.

The question is, whether John Hoffman can take as a purchaser by this description?

That the word "son," connected with other words which ascertain the son intended, is a word of purchase, has been very well settled. In all the conveyances in what is termed "strict settlement," a conveyance to A., remainder to the first, second, third, and fourth sons of B., has been considered as unquestionably valid. If these words are good to pass a remainder, I can perceive no reason why they might not pass a present estate. If, then, this conveyance had been to the first son of Peter Hoffman, the estate might have passed to the first son. So, if he had been an only son.

But it is admitted that a conveyance to the son of A., he having several sons, would be void for uncertainty, and that no averment could make it good.

(2) See *Pinner, &c. v. Edwards, &c.*, 6 Rand. 675, and *Coffman, &c. v. Russell*.  
4 Munf. 207.—[Editor.]

*Munford*

*Randolph*

*Nov 1810-1820*

*in 1821-1828*

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*Hoffman v. Porter.*

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The question then is, whether there is any thing in this deed to ascertain the son who is the purchaser?

Peter Hoffinan was in partnership with his son John, and the firm was known by the name of "Peter Hoffman & Son," I am disposed to think that this circumstance may designate the son intended in the deed.

I will not pretend that this question is free from doubt. But the justice of the case is clearly with the plaintiff, is clearly in favour of giving validity to the conveyance, and, I do not think that law ought to be separated from justice, where it is at most doubtful.

The demurrer to the plea is sustained, and that to the declaration is overruled.

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LIDDERDALE'S EXECUTORS V. ROBINSON'S ADMINISTRATOR.

Before HON. JOHN MARSHALL, Chief Justice of the United States.

HON. SAINT GEORGE TUCKER, District Judge.

A commissioner of this Court, to whom the accounts of a surviving administrator were referred for settlement, adopted the report of a former commissioner, (to whom the accounts of all the administrators had been referred), made many years before, in a distinct suit, to which there were different parties plaintiffs, and which report did not appear ever to have been acted on or approved by the court to which it was made. When the first report was made, all the administrators were living, but they had been dead long before the accounts of the surviving administrator were referred in the second suit, and the office of the surviving administrator, in the mean time, had been consumed by fire, and many of his papers destroyed with it. *Held*: That vouchers to sustain the account in such a case will not be required. The books of the administrators, if they appear to have been fairly kept, and the account of the former commissioner founded upon them, ought to be received as *prima facie* evidence, subject to be disproved, so far as either party can disprove them, or to such exception as either party may be able to sustain.

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Where an administration bond is joint, one administrator is responsible for his co-administrator.

An administrator *de bonis non*, who is also the executor of the surviving administrator, who fails for a long period of time to call the agents of the former administrators to an account, is chargeable with the whole balance appearing to be due from those agents, unless he can relieve himself from the charge of gross negligence.

Many judgments *when assets* were rendered against administrators, and assets to a large amount subsequently came into the hands of the administrator *de bonis non*—*Held*: That these judgments retained the same rank which would belong to the particular instruments on which they were founded. The only effect of such judgments is to give priority to other debts of the same dignity, on which either no judgments or subsequent judgments were rendered.

Where there are two sureties on bills of exchange and specialties, and one of them has paid more than his proportion, and his representatives seek contribution out of the estate of his co-surety, the surety who has overpaid will be subrogated to the rights of the creditor. Equity would, indeed, restrain him from recovering more than his proportion, but to that extent, his claim upon his co-surety is precisely as valid as upon his principal, and the representatives of the surety who has overpaid, are entitled to rank according to the dignity of the claims on which such excess was paid. The principle of substitution applies equally to cases arising between co-sureties and those between a surety and his principal.

THIS suit was brought by William Rae and Julia Lidderdale, of London, executor and executrix of William Robertson Lidderdale, who was executor of John Lidderdale, deceased, against James Lyons, administrator *de bonis non* of John Robinson, deceased. The bill, which was filed in 1820, states, that in the year —, William Robertson Lidderdale, executor of John Lidderdale, filed his bill against Edmund Pendleton and Peter Lyons, administrators of John Robinson, deceased, claiming satisfaction for four bills of exchange drawn by John Robinson, and taken up under protest by the testator John, for the honour of the drawer. In June, 1797, the cause came on to a hearing, during the sickness and absence of Andrew Ronald, the plaintiff's counsel, when a decree *when assets* was rendered in their favour for £793 16s. 8d. sterling, with interest on £500 16s. at five per cent. from the 4th day of November 1785, and on the residue from the 1st day of May 1786, to be considered as a debt due by simple contract: That William Robertson



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Lidderdale departed this life in the year 1814, in England, and the plaintiffs, his executors, had lately come to a knowledge of the said decree. That the said Edmund Pendleton and Peter Lyons were both dead, and that administration *de bonis non* on the estate of John Robinson had been granted to James Lyons, to whose hands assets had recently come to a great amount. The bill prayed that the decree of June, 1797, might be reviewed and reversed, because the debt was decreed as a simple contract, whereas the plaintiffs were in possession of the protested bills on which it was due, which gave it the dignity of a judgment, and that James Lyons, the administrator *de bonis non*, should be required to render an account, and that the plaintiffs should be paid their demand out of the assets. A copy of the decree was filed as stated in the bill, and the copy of a judgment, by consent, of November 22d, 1797, in an action on the case for \$1735 80 and costs, *when assets*.

On the 12th of June, 1822, the cause came on to be heard on the bill taken for confessed, and on the decree sought to be reviewed, which was filed as an exhibit, on consideration whereof, the Court, being of opinion that the complainants were not entitled to have the decree, sought to be reviewed, set aside or opened, directed one of its commissioners to settle and report the administration account of the defendant, and also to report the different debts due from the estate of John Robinson, and of the debts paid by the administrators of the said estate, stating the dignity of each debt, and also the outstanding assets. The commissioner made his report in December, 1822. At the same time, the report was recommitted, with instructions to the commissioner to complete the same, by reporting the accounts between Peter Lyons, surviving administrator of John Robinson, and the estate of John Robinson; and it was farther ordered that he report the debts paid by the administrators, stating the dignity of each, and any additional evidence in support of debts now claimed from the estate. And liberty was allowed for any creditors to exhibit their claims. This report was made in June, 1824.

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In the progress of the cause, other creditors exhibited their claims against the estate of John Robinson. The representatives of Hanberry claimed the amount of a judgment *when assets*, rendered in June, 1767. The judgment was for £ 2089 17s. 4d. sterling, and costs, and a copy thereof was filed as an exhibit.

The commissioner reported a very large fund, partly in the hands of the administrator *de bonis non*, and part not yet collected, respecting which he required the direction of the Court. He also reported the claims of creditors, to a great amount, leaving it to the Court to ascertain, and settle their respective rank and dignity.

Among these, is the claim of John Smith, executor of John Smith, deceased. The case is this. John Robinson and John Smith were the joint sureties of Thomas Reid Rootes, who died insolvent, in consequence of which, the sureties paid the debt. John Smith paid more than a moiety of the debt, and his representative filed his bill to obtain contribution from the estate of John Robinson, deceased, who was his joint surety. The original debt was a protested bill of exchange, which, according to the law then in force in Virginia, was of equal dignity with a judgment. On the part of Smith, it was contended that the joint surety who had discharged this debt, was substituted in the place of the original creditor, and that his claim for contribution against his joint surety, held the same dignity that the claim of the original creditor, against the same person, would have held. On the part of the defendant, and of the other creditors, it was contended, that the claim of John Smith was that of a simple contract creditor only, and that he must rank with simple contract creditors.

The cause came on, on exceptions to the report of the commissioner of June, 1824, which are fully stated in the following opinion of

MARSHALL, C. J.—The counsel for the plaintiffs, Lidderdale and Hanberry, have filed several exceptions to this report, the

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most important and difficult of which, respects a sum alleged by the administrator *de bonis non* of John Robinson, to be due to Peter Lyons, the surviving administrator of John Robinson, whose executor the said James Lyons is. The commissioner has stated this claim in different ways.

The counsel for the plaintiffs objects to this account altogether, because he alleges :

1. That it is not supported by vouchers.
2. That Peter Lyons is responsible for his co-administrator, Edmund Pendleton, they having given a joint bond, and Edmund Pendleton appearing to be largely indebted to Robinson's estate.
3. That balances are stated to be due from George Brooke and others, the agents of the administrators, for which the said Peter Lyons is responsible.

1. The commissioner states that this account, from 1766 to 1784, inclusive, was collected from the books of Peter Lyons, and from 1799 to the date of the report, is supported by vouchers, and this Court must presume that his statement is correct, unless the contrary is shown. The account from the year 1784, to January, 1799, is taken from a report made by Commissioner Hay, in pursuance of an order of the high court of chancery, in which — — — were plaintiffs, and the administrators of John Robinson, deceased, were defendants. This part of the account does not show the particular items, but the annual amount of receipts and disbursements. Commissioner Hay's report was made in the year 1799, while the administrators were alive, but does not appear ever to have been acted on by the court. If the transactions were recent, vouchers to sustain the account would of course be required. But in a case of such long standing, where the parties are all dead, strict proof is not to be looked for. It is the less to be expected in this case, as it is known that the office of Peter Lyons was consumed by fire, and that very many of his papers were destroyed with it. In such a state of things, the Court is much inclined to the opinion that the books of the administrator, if they appear to have been

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fairly kept, and the account of Commissioner Hay, founded on those books, ought to be received as *prima facie* evidence, subject to be disproved, as far as either party may disprove them, or to such exception as either party may make, or be able to sustain. If this course be not pursued, and the books and account be discarded, it would be necessary to remodel the account on such vouchers as either party may be able to adduce. The result of such an account could not be as satisfactory, and probably would not approach the truth as nearly as that which is now before the Court.

2. The responsibility of Peter Lyons for his co-administrator must be admitted, but the amount due from that co-administrator cannot be assumed, unless his representative were before the Court. It is the duty of the administrator *de bonis non* of John Robinson, to bring him to an account before that forum which can take cognizance of the case, and he is chargeable with great neglect of duty in this respect, as Edmund Pendleton has been dead twenty years. The Court will not, for the present, decide positively on this subject, but must resume the consideration of it, should this unjustifiable delay be continued.

3. The surviving administrator ought to have brought the agents of the administrators to a settlement of their accounts, and this duty, on the death of Peter Lyons, devolved on the administrator *de bonis non*, who is also executor of the surviving administrator. It appears to me to be reasonable that the whole balances due from these agents should be chargeable to him, unless he can free himself from the charge of gross negligence for having failed to call them to a settlement.

The debt due to Peter Lyons, whatever may be its amount, is admitted to be a debt of the first dignity. It is next to be inquired how the remaining creditors rank.

There being many judgments rendered, to be discharged when assets shall come to the hands of the administrators, the first question was, whether these judgments should rank according to their date, and should take rank of other debts on which no judgment had been rendered, or should retain the same rank

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which would belong to the particular instruments on which they were rendered. This Court is of opinion that they retain their original rank, because every creditor is supposed to be entitled to a judgment when assets, and it is not reasonable that such a judgment should disturb the order in which debts are payable by law, or should have any other effect than to establish the amount, and to give priority to other debts of equal dignity on which either no judgment, or a subsequent judgment, may have been rendered.

Money due to the estate of a deceased person, committed by a court to the said John Robinson, (1 R. C., 1819, p. 389, sec. 60,) or on judgments against the said intestate in his lifetime, are first in rank. Next, are protested bills of exchange, and then specialties.(1) Among these, judgments on bills of exchange first rank according to their date; and next, protested bills on which no judgments have been obtained, if the requisites of the law have been complied with.

Next in order, are debts due on bills which have been paid by securities; on this subject, a question of difficulty has been made. John Smith and John Robinson, were co-sureties on bills of exchange and specialties to a very great amount, on which John Smith paid more than his proportion, and his representatives now claim contribution from the estate of John Robinson. This claim is admitted, but it is contended that it is to be considered merely as a debt on simple contract. The question submitted to the Court is, whether a co-surety who has paid a debt, has a right to stand in the place of the creditor, and to be clothed with all the rights and privileges of the creditor, so far as his equity extends, or can resort only to the implied contract which the law raises in such a case. This is a

(1) But by the act of March 29th, 1831, which took effect the 1st of June thereafter, it is declared, "that in the administration of the personal assets of decedents' estates, debts due by specialty and promissory notes, or other writings signed by the decedent, or some other person, by him or her thereunto lawfully authorized, shall be regarded and taken to be of equal dignity."—*Seas. Acts of 1830-31*, p. 102, ch. 33.—[*Editor.*]

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question which depends on the authority of decided cases ; it has occurred most frequently in controversies between a surety and the principal debtor.

In the case of *Eppes et al., Executors of Wayles v. Randolph*,<sup>(2)</sup> a bond was executed by Randolph to Bevins, with Wayles as his surety. Randolph afterwards conveyed his estate to his sons, and the creditor obtained a decree against the executors of Wayles for the amount of the bond. A suit was brought by the executors of Wayles against the representatives and heirs of Randolph, alleging the insufficiency of the personal estate, and praying that the estates conveyed to the children might be subjected to the claims of creditors. Other creditors also filed their claims, and insisted that the debt to the executors of Wayles had only the dignity of a simple contract. In delivering his opinion the chancellor said : " That if Wayles's executors had taken an assignment to their trustees of Bevins's bond, they would, in his name, have been entitled to the same relief that Bevins himself would, and that a court of equity would have enjoined the heir of Richard Randolph, deceased, from pleading payment by the sureties' executors : that they ought to have the same remedy as if such assignment had been made." In affirming this part of the chancellor's decree, the president of the court of appeals said : " that the appellees, executors of John Wayles, ought to stand in the place of John Bevins, and be considered as bond creditors, so far as may effect the distribution of remaining assets, but not so as to charge the executors with a devastavit on account of payments or judgments to simple contract creditors."

In the case of *Tinsley v. Anderson*, 3 Call, 329, where the proceeds of the real estate of a living debtor were to be distributed according to the priority of the several liens upon it, the court said : " that all the creditors by judgments or decrees, ought to be paid out of the general fund, according to the priority of recovery, with this reservation, that when a prior cre-

(2) 2 Call, 103, Tate's edit.—[*Editor.*]

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ditor shall not have received his money of sureties, or sued out execution on his judgment within a year, he shall yield priority to subsequent judgments on which executions shall have been so issued, or the money received of sureties. In both instances of the money paid by sureties, as well as in all other instances, sureties ought to be placed in the situation of the creditors they shall have paid, or be bound to pay."

These two cases establish the principle incontrovertibly in Virginia, that the surety who has paid a debt stands, as respects his claim on the principal or his estate, to every purpose in the place of the creditor.

The same principle is recognised in New York, as appears by 4 Johns. Ch. Rep. 123 and 530.(3) In *Lawrence v. Cornell et al.*, 4 Johns. Ch. Rep. 545, it was enforced against a junior mortgagee.

This principle is also recognised in South Carolina, 4 De-saussure, 44.(4)

The principle that a person who has paid money as surety, or on account of another, shall be substituted in the place of the creditor, seems to be familiar in England. In 3 P. Wms. 400, it is laid down by the chancellor, that an executor who has paid beyond the assets which have come to his hands, shall rank as the creditor whose debt he has paid; and in 1 Atk. 134,(5) the chancellor says: "Indeed, where there is a principal and surety, and the surety pays off the debt, he is entitled to have an assignment of the security in order to enable him to obtain satisfaction for what he has paid over and above his own share." The principle is also laid down in 2 Ves., Sen., 302,(6) and 11 Ves., Jr., 22.(7) Indeed it seems to be too well settled to be controverted, and we find it generally laid down as an acknowledged rule rather than decided in a contested case.

(3) *Hayes v. Ward et al.*, and *Scribner v. Hickok et al.*—[Editor.]

(4) *Tankersley v. Anderson et al.*—*Ib.*

(5) *Ex parte Crisp.*—*Ib.*

(6) *Ex parte Mills.*—*Ib.*

(7) *Wright v. Morley, &c.*—*Ib.*

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But it has been supposed that, though this rule must be admitted as applicable to cases between a surety and his principal, it will not apply between co-sureties.

I can perceive no reason for this distinction. The principle which the cases decide is this: Where a person has paid money for which others were responsible, the equitable claim which such payment gives him on those who were so responsible, shall be clothed with the legal garb with which the contract he has discharged was invested, and he shall be substituted, to every equitable intent and purpose, in the place of the creditor whose claim he has discharged. This principle of substitution is completely established in the books, and being established, it must apply to all persons who are parties to the security, so far as is equitable. The cases suppose the surety to stand in the place of the creditor, as completely as if the instrument had been transferred to him, or to a trustee for his use. Under this supposition, he would be at full liberty to proceed against every person bound by the instrument. Equity would undoubtedly restrain him from obtaining more from any individual than the just proportion of that individual; but to that extent, his claim upon his co-surety is precisely as valid as upon his principal.

In reason, I can draw no distinction between the cases, and none, I think, has been drawn by the courts. In *Parsons and Cole v. Dr. Briddock et al.*, 2 Vernon, 608, the sureties who had paid a bond debt, on which a judgment was obtained against Dr. Briddock, were substituted in the place of the creditor, as against the bail to the action in which the judgment against Briddock had been rendered, and the bail was compelled to pay them the money they had paid to the creditor. In this case, the principle of substitution was applied against a surety.

The liability of co-sureties, and the dignity of a debt in a case where a judgment had been discharged by a co-surety, who was entitled to contribution, was decided, on great deliberation, after very solemn argument, in the case of *Burrows & Brown v. The Administrators of Patrick Carnes*, 1 Desaussure, 409.



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I was originally strongly inclined to the opinion that, in a case where a party could sue at law, and would be, in a court of law, a simple contract creditor only, he would retain the same rank in a court of equity also, and would not be substituted in the place of the original creditor. But I am satisfied, on examining the subject, that the decisions are otherwise, and I must acquiesce in those decisions.

The representatives of John Smith, then, will rank according to the dignity of the claims on which they have paid more than their equal proportion.

All other sureties will, in like manner, be substituted for the creditor whose debt they have discharged, and will rank as he would have ranked were he before the Court.

*Note.*—The Court, consisting of MARSHALL, C. J. and ST. GEORGE TUCKER, J., being divided in opinion upon the question whether the claim of John Smith to contribution was entitled to be substituted to the same rank and dignity with the debt which he had paid, as to the excess over and above a moiety thereof, certified that question to the Supreme Court for its decision. The Supreme Court unanimously sustained the opinion of the Chief Justice. See 12 Wheat. 594. 6 Cond. Rep. Sup. Ct. U. S. 656.—[Editor.]

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BYRD V. BYRD'S EXECUTOR ET AL.

Before Hon. JOHN MARSHALL, Chief Justice of the United States.

W. B., by his last will, created, in the first instance, a separate fund, consisting of land, one hundred negroes, and other personal estate, for the payment of his debts, and then gave to his wife, for life, certain plantations, *with all the remaining negroes, and stock of all sorts.* He then directed that at the death of his wife, all his "estates whatsoever, consisting of land, negroes, stocks of all sorts, plate, books, and furniture, be sold as soon as convenient, and the money arising from the sale thereof be equally divided among all (his) children that are alive, &c." By a subsequent clause of the will, the testator, after devising cer-

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tain lands to his son J., bequeathed to him "his choice of ten negroes, after (his) wife (had) chose such as she (pleased)" over and above his share of the money aforesaid. In like manner the testator proceeded to make specific bequests of slaves to several of his other children. The separate fund created for the payment of debts proving wholly inadequate for that purpose, the whole estate, real and personal, including the specific legacies of slaves, was sold by the executor, and after the payment of all the debts out of the general fund, a considerable sum remained to be distributed among the legatees. The question submitted to the Court was: In what proportions should this residuum be distributed between the specific and general legatees of W. B.? The Court Held:

1. That in the construction of a will, the whole of it must be taken together, and the intent of the testator collected from the entire instrument, without paying too much regard to the arrangement of the clauses. The general clause, bequeathing all the testator's *remaining negroes, &c.* to his wife, for life, and directing his whole estate, of every description whatever, to be sold at her death, and the proceeds to be equally distributed among his children, is clearly restrained by the subsequent clauses, giving specific legacies to some of them, as well that bequeathing a certain *number*, as those which designated the slaves by *name*. The will must be construed as if the clauses giving specific legacies had preceded the general clause providing for his wife, and the word "*remaining*," in that clause, must be understood as having reference as well to the *specific legacy* clauses, as to that creating a separate fund for the payment of debts. If, then, the sale of the negroes specifically bequeathed was not required for the payment of the testator's debts, the legatees were entitled to them respectively during the life of the widow, and if they were sold by the executor, not for the payment of debts, but under the general clause directing the sale of the whole estate, the proceeds of such sale represent the slaves themselves, and the specific legatees are entitled to them.
2. That so far as the specific legacies have been sold, and the proceeds applied to the payment of debts, the specific legatees have a right to resort to the general fund for remuneration, upon the principles which regulate courts in marshalling assets. That general fund being a mixed fund, composed of the proceeds, partly of personal, and partly of real estate, not chargeable with the payment of debts, the portion of it resulting from the sale of the personalty, is liable, in the first instance, to make good such specific legacies as have been sold for debts, and, if that be insufficient, the money arising from the sale of the real estate must be applied to the same object, *so far, and so far only, as the specific legacies have been absorbed by specialty debts that bound the real estate.*
3. That in the application of the principle that the real estate of the testator is liable to specific legatees to the extent of the specialty debts which have been satisfied out of the specific legacies, their title to the aid of a court of equity is only co-extensive with their equity. Therefore, where specific legacies have been sold, and out of the proceeds thereof many specialty debts have been paid off in a depreciated paper currency, the measure of reimbursement from the real estate ought to be, *the whole actual loss of the personal estate*, and not the mere nominal sum advanced by it.

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4. That the value of the money advanced by the personal for the real estate, must be ascertained by the application of the scale of depreciation as fixed by law, *on the day that the personal property was sold*, and not at the time the debts were paid; that standard approximating, more nearly than any other, to the *actual loss* sustained by the personal estate.
  5. That the interest allowed the personal estate for the sums advanced by it in discharge of specialty debts, should, in accordance both with the general course of the Court, and with the justice of this particular case, be limited to twenty years.
- As to the rule for ascertaining the value of the ten slaves specifically bequeathed to J., *but not designated by name*, see the second opinion following.

MARSHALL, C. J.—This suit is brought for the distribution of the estate of William Byrd, deceased, among his legatees.

The testator by his last will, created, in the first instance, a fund consisting of a tract of land, one hundred negroes, and other personal property, for the payment of his debts. He then gives to his wife, for life, the plantations of Westover and Buckland, with all the remaining negroes and stock of all sorts, and adds: "It is my will and desire that, at the death of my dearest wife, all my estates whatever, consisting of land, negroes, stocks of all sorts, plate, books, and furniture, be sold as soon as convenient, and the money arising from the sale thereof be equally divided among all my children that are alive at the time of my dear wife's death, deducting therefrom such sums as they may claim under the wills of" his mother and son William. The testator then enumerates advances he had made to several of his children, which are to be deducted from the amount of their respective portions, and also states contingencies on which the legacies of individuals are to be forfeited; after which he adds, "should any of my children die before my wife, and leave lawful issue, the share of my deceased child shall go to them, and be equally divided." "I give to my son John, over and above what he will share of the money aforesaid, all my right to the mines in Fincastle, known by the name of Chiswell's mines, and two thousand acres of the land I claim under his majesty's proclamation of 1763. I likewise give to him his choice of ten negroes, after my wife has chose such as she pleases."

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The testator then devises to several sons, certain portions of the land surveyed for him under the proclamation of 1763, over and above their several shares of the fund directed to be distributed among them all, and to his daughters, in like manner, certain slaves by name.

The whole estate, including the specific legacies of slaves, has been sold and the debts have all been paid; and there remains the sum of \$28,645 45 to be distributed among the legatees. The specific legatees claim their legacies as a charge upon this joint fund, to be paid before the distribution directed by the will. This claim is resisted by the other legatees.

It has been placed on two grounds :—1. The will of the testator. 2. On the principle of marshalling assets.

1. The will of the testator :

In its construction, the whole is to be taken together, and the intent is to be collected from the entire instrument, without paying too much regard to the arrangement of the clauses. It is not denied that the testator intended the specific legacies as additional to the distributive share of each child, in the aggregate fund. He says so in express words; and there is no contrary opinion advanced in any part of the will. He supposed that the fund assigned for the payment of debts would be sufficient; and makes his will under that impression. Had the fact conformed to this opinion, and the whole estate, except that fund, had remained together, untouched by debts, it is not probable that this controversy ever could have arisen. It would scarcely be denied, that a bequest to his son John of ten slaves, over and above his equal share of his estate, was what it purported to be, and that those ten slaves were to be taken by John, in addition to his equal distributive share of the general funds. The mistake of the testator respecting the adequacy of the fund for the payment of debts, cannot change the construction of the will in this particular. His intention respecting his specific bequests remains the same; and though we may conjecture that he would have made some change in this respect, had he understood the true state of his affairs, no court can undertake to make the change for him. In adjusting the rights of the parties,

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then, this intent must be kept in view, and the inquiry is, how does it affect the fund now to be distributed?

After setting apart one hundred slaves for the payment of his debts, the testator gives to his wife, Westover and Buckland, and all the remaining negroes, stock, &c., for her life, and directs that, at her death, his whole estate, of every description, shall be sold, and the money arising from the sale be equally divided among his children.

This clause certainly requires an equal distribution of all the money arising from the property to be sold under it, and it becomes material to inquire what property it comprehends. The language is, that it comprehends his whole estate; and if these words are not clearly restrained by other parts of the will, the direction must be considered as extending to the whole.

I think it perfectly clear that they are so restrained. The testator directs his whole estate to be sold at the death of his wife. This direction can operate only on property which shall at that time form a part of his estate. Property previously disposed of cannot be the subject of this clause. Thus, he devises two thousand acres of his military land to his son John. The devise operates as a conveyance, and on the death of the deviser, vests the land in the devisee. It ceased to be a part of the estate of the testator, when that estate is to be sold, and, consequently, cannot be acted on by the clause under consideration. In like manner, the testator devises separate tracts of land to his sons, Thomas, Otway, and Charles. Upon his death, these lands cease to be a part of his estate, and vest in the devisees. To construe the clause directing the sale of his estate at the death of his wife, as extending to them, would be to annul these devises, and to set aside a large portion of the will.

The same principle applies with equal force to the specific legacies. After the devise to his son Charles of one thousand acres of land in the county of Fincastle, the testator adds: "I likewise give him his man Tom, and little Jack White, and his choice of two negro girls, over and above his share of the money aforesaid."

This bequest was obviously intended to take effect immedi-

ately. From the language of the will, Tom was, probably, at the time, in possession of the legatee. It is impossible to reconcile this bequest with an intention to sell these negroes, and to place the money in a common fund, out of which the legatee was afterwards to draw it. It is not their proceeds which he is to draw from the fund, over and above his equal share in it, but he is to have the negroes themselves, over and above that equal share. So with respect to the other specific legacies. It is perfectly clear that they are not to be sold, but are to pass specifically to the several legatees.

Between those legacies which express the names of the slaves which are given, and those which express only their number, leaving the choice to the legatee, there can be no difference, so far as respects this point. The intention of the testator to exempt them from the clause directing the sale of his estate, is equally clear. Indeed, in the expressions of the clause, giving ten slaves to his son John, there are some additional evidences of this intent. He shows that the selection is to be made by his son during the continuance of his wife's life-estate, and, consequently, anterior to the sale of his estate, since he restrains his son's right of choice, so far as to prevent its interfering with the choice of his wife. He gives to his wife "all the remaining negroes" for life, and yet he gives his son John his choice of ten slaves out of these remaining negroes; but in selecting them, he is not to interfere with the choice of his wife. The plain meaning is, that after setting apart the fund for the payment of debts, his son is to choose ten slaves; but if, in exercising this right, he should take any which his wife might be particularly anxious to retain, her choice should in such case be respected. It is perfectly clear, that the will is to be construed as if the clause giving all the remaining negroes to his wife for life, had been postponed to those which give specific legacies. The word "remaining" refers to all the clauses giving specific legacies, as well as to that which constitutes the fund for the payment of debts. This avoids the manifest repugnancy which would otherwise exist in these different bequests. Upon this construction, which gives effect to what, I think, was the obvious intent

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of the testator, the specific legacies are neither comprised in the bequest to his wife, nor in the clause directing the sale of his estate; and consequently, they compose no part of the fund which is to be equally divided among his children.

So far as the intent of the testator can be carried into effect, the legatees were entitled, during the life of Mrs. Byrd, to their specific legacies; but the law interposes, and casts the whole personal estate upon the executor for the benefit of creditors. Their claims must be satisfied before any interest can vest in the legatees; but after the satisfaction of their claims, should any of the slaves specifically bequeathed, or their descendants, remain unsold, the legatees are unquestionably entitled to them. If they have been sold by the executor, not for the payment of debts, but under that clause of the will which directs the sale of the whole estate, the money must represent them, and remain the property of the person who was entitled to the slaves themselves. If it has been carried into the aggregate fund, it has been improperly placed there, and must be taken from it. If the slaves have been sold for the payment of debts, the rights of the parties must be governed by those principles which regulate courts in marshalling assets.

2. Have the legatees, whose specific legacies have been sold, and the money applied to the payment of debts, a right to demand satisfaction from the general fund?

Had this fund been derived from the personal estate alone, as that estate was chargeable with debts in the first instance, and ought to have been exhausted before recourse was had to the specific legacies, the fund would unquestionably be liable, in the first instance, to compensate the specific legatees for such of their legacies as had been sold for an object with which it was first chargeable.

Had the fund been derived entirely from real estate, and that had been charged with the payment of debts, the same principle would have governed the case.(1) But had the real estate not

(1) *Clarke and wife v. Bock*, 1 Leigh, 487; *Mollan v. Griffith*, 3 Paige, 402; *Halwood v. Pope*, 3 P. Wm's, 323.—[*Editor*.]

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been subjected to the payment of debts, either by the will of the testator, or by the law of the land, I know of no case which has gone so far as to subject it to the claim of legatees whose legacies have been taken by creditors. In this case, the testator has not subjected his real estate to the payment of debts. It is, therefore, liable no farther than for specialty debts, which bind the heir, and can be charged with legacies so far only as the personal estate has been applied in payment of debts for which the real estate was liable.

Being a mixed fund, composed of the proceeds, partly of personal and partly of real estate, that portion of it which comes from the personal estate is liable, in the first instance, to make good such specific legacies as may have been sold for debts; and, if that be insufficient, the money arising from the sale of real estate must be applied to the same object, so far as debts by which the land was bound have been satisfied from the personal estate.

A difficulty arises in adjusting the amount between the real and personal estate, from the fact which is alleged at the bar, that many of the specialty debts which have been discharged by the personal estate, have been paid off in paper money, and it is contended, that these, as between those parties, are advances made at the time of payment, which must be subjected to the scale of depreciation established by law.

It is certainly true, that the legatees have no *legal* claim on the real estate, to be reimbursed moneys paid by the personal property in discharge of debts for which both were bound; and there is great reason in the position, that their title to the aid of a court of equity can be co-extensive only with their equity. But how far does this equity extend? The real estate is undoubtedly relieved to the extent of the debt from which it is discharged; and can make no just objection to retributing the personal estate to the extent of the injury that that estate has sustained; but I am not satisfied, that a principle which courts of equity have taken up solely for the protection of simple contract creditors and legatees, can be justifiably so applied as to enable those persons to make large profits out of the real estate. Ad-



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mitting the real estate to be relieved to the amount of one thousand dollars, by the advance of five dollars from the personal, a court of equity might not interpose to restrain those entitled to the personal estate from asserting their claim to its extent; but I am not satisfied that a court of equity ought to interfere in aid of those persons beyond the sum actually advanced. But there is much difficulty in ascertaining what this sum is. The value of the money, on the day of its payment, is not, necessarily, the real amount of loss sustained by the person making the payment. The depreciation was continual, and as the gain of the real estate is the whole nominal sum, the reimbursement ought to be the whole actual loss of the personal estate.

It will be extremely difficult to adjust this subject with any degree of certainty. If the parties can make any arrangement satisfactory to themselves, or state any account by which the necessary information can be given to the Court, I shall be much disposed to apply the principle which has been stated to this part of the case.

Having determined that the legatees who claim under the will of the testator a certain number of slaves not named by him, but to be shown by themselves, and it being stated that these legacies are unsatisfied, it remains to determine how they are now to be satisfied.

If, after the payment of debts, there were negroes remaining in the estate not given by name, they would be liable to these legacies, if the legatees chose to take them; if there were no such slaves remaining, then the value of the legacies must be determined on some equitable principle.

**DECREE.**—This cause came on to be heard, &c., on consideration whereof this Court is of opinion that the specific legacies given in the will of the late William Byrd, are not comprehended in the clause which gives the remainder of his slaves to his wife for life, nor in that which directs sale of all his estate at her death; but were intended to pass immediately to the legatees, and might be claimed by them as soon as the condition of the

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estate, with respect to creditors, would justify the executrix in paying legacies. If, therefore, after the payment of debts, any slaves bequeathed by name in the will, or their descendants, remained in the possession of the personal representative of William Byrd, the person to whom the same were bequeathed, or his or her representative, would be entitled to demand them; and if they have been sold, and the proceeds are not required for the payment of debts, such person is entitled to the money arising from the sale.

And the Court is further of opinion, that the representative of John Byrd, to whom ten slaves were given, to be chosen by himself, and of Charles Byrd, to whom two girls were given, to be chosen by himself, those legatees or their representatives might exercise the right of choice given in the will, if the condition of the estate, after the payment of debts, would admit of it; and if such slaves have been sold, then they are entitled to the money arising from the number which they respectively claim, with interest from the expiration of the credit given at the sale; but if the number to be chosen did not remain unsold when the debts were discharged, so that these legacies cannot be satisfied by receiving the slaves themselves, then they ought to be satisfied out of the residuary fund, so far as the principles hereinafter stated will allow them to resort to it.

That portion of the fund which arises from the personal estate, is liable, in the first instance, to the payment of the specific legacies which have been sold for the payment of debts; and if this shall prove insufficient, an account must be taken of the personal estate which has been applied to the payment of debts that bound the land, and the fund arising from the real estate must be charged to the amount so paid by the personal estate. If in taking this account, it shall appear that specialties binding the land have been paid by the personal estate in paper money, and it can be shown what the real value of such paper money was to the personal estate, the real estate ought to be charged only to the extent of that value.

# **Circuit Court of the United States.**

**VIRGINIA, MAY TERM, 1825.**

**BEFORE**

**HON. JOHN MARSHALL, Chief Justice of the United States.**

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## **BYRD V. BYRD'S EXECUTOR ET AL.(1)**

IN pursuance of the interlocutory decree, recited in the last case, the commissioner to whom the accounts were referred, made his report in May, 1825, showing the amount of debts paid by the executrix of William Byrd, out of the personal fund for which the estate was bound. The commissioner's account contained two parallel columns, one showing the amount in paper money paid in discharge of bond debts, and the other the value of the paper money *in specie*, according to the scale of depreciation as applied at the periods at which those debts were paid respectively. This account exhibits very strikingly

(1) This is the same case in which an opinion was delivered by the Chief Justice, and an interlocutory decree in conformity therewith was rendered at the last term. For the points decided in this second opinion, the reader is referred to the syllabus prefixed to the first opinion delivered in the case, *ante*.—[Editor.]

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the steady and rapid progression of the depreciation of the paper currency of the country during the time embraced within it. Of one hundred and twenty-five slaves left by the testator, William Byrd, (besides the jointure slaves of the widow, in which she had a life estate,) ninety were sold under the will immediately after the death of William Byrd, viz.: in April, 1777, and the fund arising therefrom being wholly inadequate to the payment of his debts, the residue were sold in November of the same year. The first debts paid by the executrix in April, 1777, are credited in the account at the rate of  $2\frac{1}{2}$  dollars in paper for one in specie. The debts paid in 1778, are credited at five for one; those in 1779, from twenty-one to twenty-four for one, according to the period of the year at which the payments were made, and in October, 1780, when the last debt was paid by the executrix, the depreciation had reached the great depression of seventy-three for one! The aggregate amount of these specialty debts in paper money, including interest for twenty years, was \$122,057 94, and in specie, \$28,784 80. On the questions arising out of this report, the Chief Justice delivered the following opinion:

MARSHALL, C. J.—The principal question now to be determined is, what rule shall govern in ascertaining the value of the paper money paid by the personal estate in discharge of debts which bound the lands.

It was decided at the last term, that the claim of the personal estate did not extend to the full relief which the real estate obtained, but to the actual burden borne by itself. That opinion is still retained.(2)

The parties have suggested three rules, by one of which it has been supposed that the value of these payments must be ascertained.

1. The first is the value of slaves, according to sales made in specie some short time before the emission of paper.

(2) See *ante*, pp. 176, 177.—[Editor.]

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2. The value of money, according to the scale of depreciation, for which the slaves and personal estate actually sold.

3. The third is the value of money, by the scale, at the time each debt was discharged.

If the actual value of the particular slaves and other property, constituting the subject of the present inquiry, was totally unknown, it would be necessary to resort to other extraneous evidence, for the purpose of fixing this value, and on the failure of any estimate made of the property itself, other less certain evidence would be received. In looking for this other testimony, that to which the counsel for the specific legatees have resorted, the actual sales of property of the same description, and, probably, of nearly the same value, would not be disregarded. But when the property itself has been actually sold, fairly and legally sold, its value is ascertained by that standard, which determines the worth of every thing. We cannot desert this certain standard for one which is conjectural.

Had this sale been made for specie, instead of paper-money, no person would have resorted to other sales in order to ascertain the value of the property sold. That the sales were made for paper, can make no other difference than arises from a supposed misapprehension in the bidders at the sale, of the real value of the medium in which it was made. This value was afterwards established by the legislature, who must be supposed to have been regulated by their knowledge of the actual state of the currency. The rule, probably, works unjustly in many cases; but it is a general rule, it has governed all the transactions of the day, and we cannot be sure that a departure from it would not work more injustice than an adherence to it.

There were many circumstances to reduce the price of slaves and other property, at the time this sale was made. Our ports were blocked up, the produce of labour was unsaleable, and the nation was engaged in a war which would probably render this gloomy state of things of incalculable continuance. These circumstances might have great influence on the intrinsic value of property. Within our own recollection, changes almost equal-

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ly great have taken place. Who would ascertain the value of property in 1787 by sales made in 1784? or the value of property at this day by sales made in 1817? It is not unreasonable to suppose that the sales of 1768, or of 1772, may afford as inaccurate a standard for the value of 1777. It is true that just ideas of depreciation may not have prevailed at the time, and had these sales been occasioned by the illegal or iniquitous conduct of the heirs, there might be justice in throwing the loss on them. But the sale was inevitable. The law required it; and the executor, whose duty it was to sell the personal estate, had no power to sell the lands. There is, then, no blame attached to any person; no person could have brought the real estate to the aid of the personal, or have prevented its sale. The loss produced by that sale is one of those calamities which grow out of the state of things, and which human wisdom could not avoid. Equity, when it interposes in such a case, must consider all its circumstances, and the situation of all parties. In doing so, no reason is perceived which will justify a departure from the sales themselves, in search of any other standard to ascertain the value of the property sold, nor a departure from the state of depreciation, to ascertain the value of the money given for it.

But supposing the scale of depreciation to furnish the rule, the parties still differ as to its application. The specific legatees claim the date of the sale, and the residuary legatees, the time when the money was applied in discharge of the debts.

That the time of payment does not furnish the true rate of reimbursement to the personal estate, was, I think, substantially decided at the last term, and I still retain that opinion. It is true, as has been urged by counsel, that if we personify the personal and real estate, and suppose one to have advanced a given sum for the other on a given day, the value of the sum on that day by the scale of depreciation, would have constituted the demand both in law and equity of the person making the advance. It would have been a legal demand, regulated by the law. But this case stands on distinct principles. The claim

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of the personal estate is not given or measured by the act of assembly. It originates in equity, and is co-extensive with its equity. This equity regards the gain of the real estate and the loss of the personal. There is no exact standard by which these are to be measured in the case which has actually occurred, but certainly the value of money, which in fact depreciated daily, at the time of its payment to the creditor, does not approach the actual loss sustained by the person making the payment, so nearly as its value when the property was sold to raise it.

I felt some doubts whether, as the sales were probably made on credit, the scale at the day of sale or at the day of payment ought to be applied. I have supposed that the scale at the day of sale furnishes the true standard, because at that early stage of depreciation, it is not probable that the future rapid decline of the money was foreseen, and because the legislature has fixed the value of all contracts payable in future, at their date.

I am therefore of opinion, that the value of the money advanced by the personal for the real estate, is to be ascertained by the scale of depreciation on the day the personal property was sold.

The next question is, to what sum are the specific legatees entitled from the general fund?

This question has been already decided, so far as respects slaves given by name. Where they have been given by number, to be selected by the legatee, it remains to be decided by what rule their value or price shall be estimated.

The testator constituted a fund for the payment of his debts, to consist in part of one hundred slaves. He then gave to his son John a choice of ten slaves, not to interfere with those which his wife might chose to keep.

It appears that the testator left one hundred and twenty-five slaves at his death; of these, one hundred were withdrawn by his will for the payment of debts. It could not be intended by the testator that his son's choice should interfere with this fund. If must be made from the residue. Ninety-two slaves were sold

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in April 1777, and the residue in November of the same year. The first sale must be presumed to have been made in pursuance of the will; and as the debts exceeded the fund, it would have been the duty of the executor, had he been limited to the number prescribed in the will, to have selected the most valuable for sale. It follows, that eight of the highest priced slaves sold in November, 1777, must be considered as part of the one hundred directed to be sold by the will, and John Byrd is at liberty to select ten from those which remain. He will be entitled to twenty years interest on this sum.

If his legacy were to be satisfied out of the jointure slaves sold after the death of Mrs. Byrd, he would be entitled to interest only from that sale.

It has also been made a question what interest shall be allowed the personal estate on the sums it has advanced for debts for which the real estate was chargeable?

I think it most consistent with the general course of the Court, and with the justice of this particular case, to limit the interest to twenty years.



# Circuit Court of the United States.

VIRGINIA, NOVEMBER TERM, 1825.

BEFORE

Hon. JOHN MARSHALL, Chief Justice of the United States.

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## GARNETT, Executor of Brooke, v. MACON ET AL.(1)

To sustain the vendee's allegation that the contract was abandoned by implication, the conduct of the vendor ought to be such, as to justify a reasonable man in believing that he acquiesced.

In equity, whether the lands be charged by the will, or the bond, of the ancestor, creditors must exhaust the personal estate before they can resort to the lands.

And, in such case, a decree against the executor is not conclusive, but *prima facie* evidence only, against the heir or devisee.

To avoid circuity of action, a covenant may be pleaded as a release; but it must be a covenant between those parties only; and if it contains no words of release, it will not be construed such, unless it gives the covenantee a right of action which will precisely countervail that to which he is liable; and unless, too, it was the intention of the parties that the last instrument should defeat the first. Parol substitution of a third person for one of several obligors, does not release the rest.

If there be a joint decree against the executors of two persons, and a creditor receives a moiety of the debt from the representatives of one of them, and cove-

(1) Republished from 6 Call, 308.

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nants not to levy the residue of the decree upon the estate of that one, it does not discharge the representatives of the other.

What release to one will discharge the rest of several obligors; and *e contra*.

It is the course of a court of equity to decree, in the first instance, against the party who is ultimately responsible; but this is done only where the parties are before the Court at the time of the decree, and their several liabilities are clearly ascertained.

The court of chancery has established it as a rule, that where the charge is general, the purchaser is not bound to see to the application of the purchase-money. But if the trustee sells with the avowed purpose of excluding the debts of him who created the trust, the purchaser voluntarily assisting him in it, would not be secure.

And if he have notice of a debt before he pays the money, he may be affected if he proceeds with the purchase.

If the executor sells a chattel, specifically devised, to a person who knows there are no debts, the purchaser takes the property subject to the bequest.

Both on principle and authority, a specific performance will not be decreed at the instance of the vendor, unless his ability to make a title be unquestionable.

For, if no incumbrance be communicated to the purchaser, or known to him to exist, he must suppose himself to purchase an unincumbered estate:

And, therefore, his objections to taking it need not be confined to cases of doubtful title, but may be extended to incumbrances of every description, which may embarrass him in the full enjoyment of his purchase.

The English court of chancery has never laid down the broad principle, that time was never important: on the contrary, the present doctrine there is, that where time is really material to the parties, the right to a specific performance may depend upon it; and the same doctrine prevails in the courts of the United States.

Although mere inadequacy of price is not a sufficient ground for a court of equity to refuse its assistance, yet if an unreasonable contract be not performed according to its letter, equity will not interfere.

And there is no difference between a contract, unreasonable when made, and one which becomes so afterwards, if the applicant be in fault.

The principle is, that a very great change in the value of the article is a serious objection to a decree for a specific performance, where the vendor is in fault, as it may affect the arrangements of the vendee for a compliance with the contract.

**WILLIAM GARNETT**, as executor of Richard Brooke, exhibited his bill in the superior court of chancery, for the Richmond district of Virginia, against William H. Macon, John Campbell, an absent defendant, and others, setting forth, that the said Richard Brooke, devisee of George Brooke, empowered his executors to sell his real estate; and that the plaintiff,

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as executor, had, on the 10th of June, 1818, sold a tract of land, called Mantapike, to the defendant, Macon, who paid part of the purchase-money, but had since refused to fulfil the contract, alleging that the land is subject to the payment of a debt which Carter Braxton owed to Robert Campbell, and for which George Brooke, whose will charged his lands with the payment of his debts, was security. That there was no just cause of apprehension, as a detail of the circumstances would show. That Braxton's debt was the balance due upon some bills of exchange drawn by him, in July 1768, and secured by a mortgage upon thirty slaves, and two tracts of land called Broadneck and Foster's, both which tracts Robert Campbell afterwards released; and subsequently thereto, to wit, in 1775, William Aylett and George Brooke, without any knowledge of the release, executed an obligation to Robert Campbell, binding themselves to stand securities for whatever sum Braxton owed him; but that obligation being afterwards lost, they, on the 15th of December, 1775, entered into another, under seal, which, reciting the loss of the former, bound them to pay the debt then due. That, in August, 1777, Robert Page, by indorsement on the obligation, substituted himself in the room of Aylett, with the assent of Robert Campbell, but without the knowledge of Brooke. That Braxton, in 1779, made a deed of trust to indemnify Page and Brooke, and a mortgage in 1792, but Page released part of the subject. That George Brooke died in 1781 or 1782, and Robert Campbell in 1791. That, in 1794, the defendant, John Campbell, as assignee and representative of Robert Campbell, brought suit, in the high court of chancery, against Carter Braxton, Robert Page, and Robert Price, the executors of George Brooke, to have the mortgages and trust deeds carried into effect; but the heirs and legatees of George Brooke were not made parties to the cause. That Page died, in 1794 or 1795, subsequent to the commencement of the suit, which was revived against his representatives. That the defence made by Braxton, Page, and Price, was usury, and *the act of limitations*: both which points were decided against them by the chancellor,

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who decreed the executors of Page and Brooke to pay so much of the debt as the mortgaged subjects should prove insufficient to satisfy: which decree was affirmed by the court of appeals, and the cause sent back to the court of chancery for further proceedings. That the defendant, Campbell, has ever since been pursuing the representatives of Page only, without taking any steps against Price. That George Brooke's estate is not liable, as well because the obligation of Brooke and Aylett does not bind their heirs, as because the debt was not the proper debt of George Brooke, whose responsibility for it ceased by Robert Campbell's release of the lands; by the acceptance of Page in the room of Aylett; by the defendant, Campbell's, failure to pursue Price; and by the release of part of the indemnity subject by Page, whose estate ought, consequently, to bear the whole burden. That the plaintiff was therefore able to make a good title; and that the contract ought to be performed by Macon.

The answer of Macon admits the contract of the 10th of June, 1818, and says that he paid \$4000 of the purchase-money in anticipation, and bought wheat from Bagby for the purpose of seeding the land: during all which time, he knew nothing of the claim of Campbell, or of George Brooke's will, but supposed Mantapike to be free from incumbrances, except a mortgage to Young, which was represented of no great amount, and was to have been paid off by the complainant before he made a deed for the land, although it is still unsatisfied. That the first information which the defendant had of Campbell's claim, was in the latter end of 1818, from Govan the agent, and that he immediately applied to counsel to investigate the title, who discovered the charge in Brooke's will. Upon which the defendant, finding himself involved unexpectedly in a lawsuit of interminable length, with numerous parties, abandoned the contract, and gave notice of it to the plaintiff by letter of the 16th of December, 1818. That the plaintiff neither returned an answer, nor apprized the defendant that he should insist upon the contract, until the institution of this suit, several months after-

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wards, but, on the contrary, kept possession of the land, paid Bagby for the wheat, and never tendered a conveyance:—all which, the answer insists, released the defendant from the contract. In his amended answer, he said that, after the purchase, he advertised a plantation for sale, to assist in paying for it; but gave over the idea upon discovering Campbell's claim; since which Mantapike had fallen greatly in value, and it would be ruinous now to complete the contract.

The original subpoena, which issued on the 26th day of December, 1818, was not executed: the bill was filed in June, 1819, and the writ was served upon Macon in January, 1820.

On the 18th of June, 1821, the chancellor, taking the bill for confessed against Campbell, who knew nothing of the suit, and declaring his opinion to be, that the substitution of Page for Aylett released Brooke from his obligation, and that the heirs and legatees of the latter had still a right to contest the debt, as they were not parties to the suit in the court of appeals, decreed a specific performance of the contract, and directed an account of the profits of the land from the 1st of January, 1819. But it being afterwards discovered that Keith, another British subject, represented him as the assignee of Robert Campbell, the plaintiff revived the suit against him, who filed a bill in the Circuit Court of the United States, against the plaintiff and others, to subject the Mantapike land to payment of Campbell's debt, and, by petition under the act of Congress, removed this cause, of *Garnett &c. v. Macon and others*, into the same court, where he appeared and put in his answer, which was received, and, of course, set aside the interlocutory decree of the chancellor.

While the cause remained in the court of chancery, the agent of Campbell, upon receiving a moiety of the debt from Page's representatives, gave them a discharge, with a reservation of Campbell's rights against the heirs and representatives of Brooke, as to the other moiety.

The answer of Keith relies on the decree of the court of appeals: insists upon the obligation of Brooke and Aylett, which

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it contends was not impaired, either by Robert Campbell's release of the lands, as the obligation was given to procure it, and the release was of record when the obligation was made; or by the substitution of Page for Aylett, which was collateral *adum pactum*, and gave no time; or by any of the other transactions referred to in the bill and proceedings; asserts that proper steps had been taken to obtain payment of the decree of the court of appeals, but the same had proved abortive, as none of the mortgaged property could be found: denies that the plaintiff can make a good title until Campbell's debt is paid, but claims satisfaction out of the proceeds, if performance of Macon's contract is decreed.

The exhibits consist of—1. A copy of the record in the suit of Campbell against Braxton, Page, and Price, which contains Braxton's mortgage to Robert Campbell; the obligation of Brooke and Aylett; and the substitution of Page, which is without a seal, and expresses no consideration. 2. The releases by Robert Campbell, in May and September, 1773, of the mortgaged lands. 3. The agreement of the 10th of June, 1818, between the plaintiff and Macon, which stipulates that the plaintiff should sow the land that year with wheat, for the defendant, the latter furnishing the seed; and that part of the purchase-money should be paid on the 1st of January, 1819, at which time Macon was to receive possession, and give a mortgage on the land for the other two instalments. 4. Macon's notice to the plaintiffs that he had abandoned the contract. 5. Richard Brooke's two mortgages to Young and Gaines, that is to say, one to indemnify them as sureties for his administration of William Brooke's estate, and the other to save them harmless as his sureties upon an injunction to a judgment obtained against him by Price as executor of George Brooke. 6. Sundry releases from the representatives of Young and Gaines, procured since the institution of the suit, and most of them of very late date. 7. A copy of the settlement of Richard Brooke's administration of William Brooke's estate, made in the latter part of the year 1824, showing a balance due to the estate.

8. A copy of George Brooke's will, which contains this clause, "*after my just debts are paid, &c.*" Subsequent to which it devises Mantapike to Richard Brooke. 9. A copy of Richard Brooke's will, which empowers his executors to sell his lands and distribute the proceeds among his own legatees. 10. A copy of Macon's advertisement in the newspapers (soon after his contract with Garnett), offering an estate in Hanover for sale, in consequence of the purchase of Mantapike, which he discontinued upon abandoning the contract.

Smith, who wrote the contract, proved that Garnett, on receiving payment of the first instalment, was to make "*a full and complete title*" to the land, to Macon, who was to give a mortgage on it for the other two instalments. That Macon was ignorant of Campbell's claim; and, when he afterwards mentioned the information he had received from Govan to Garnett, the latter admitted that he knew of Campbell's suit at the time of the sale, but had not told Macon of it, because he supposed it was abandoned, as no process had been served upon him. The other witnesses proved that Garnett admitted, since the contract, that he was to make a perfect title, and obtain a release of Young's mortgage. That the seed wheat had been purchased by Macon of Bagby; but that Garnett had paid for it, used it, and kept possession of the land, which had fallen very much in value since the date of the contract.

*Standard*, for the plaintiff. The case involves three questions: 1. Whether the vendor can make a good title? 2. Whether he has abandoned the contract, or forfeited his right to a specific execution of it? 3. Whether the fall in the value of the property bars the plaintiff's claim to relief?

The only objection urged against the first, is Campbell's debt. But that claim, whether due or not, has no influence. For, if it be not due, then there is no pretext for resistance on the part of the defendant: and, if it be due, but the charge left ineffectual through the supineness of the creditor, it will not obstruct a specific performance.

The last proposition will be first examined.

In all cases of general charge, a sale, before any suit by the creditors, defeats the charge: for it makes the proceeds personalty in the hands of the executor, and exonerates the land in those of the purchaser, who may insist on a conveyance, without regard to the creditors.

1. Because he is entitled to the property from the moment of the contract; for that creates such an interest in the land, that the law gives an action for non-conveyance, and equity a bill for specific performance. He has, therefore, law and equity both on his side; and that constitutes perfect right. 7 Ves. 274; 11 Ves. 554. Whereas general creditors, who neglect to put the subject into the custody of the court, have no interest in the land itself, but an equitable claim only, depending upon the solvency of the personal estate, and which can never be rendered effectual until that is discussed.

2. Because, in consequence of this doctrine, it has become a settled rule, that, if there be no suit depending, the sale can never be overreached by the charge, unless the purchaser be bound to see to the application of the purchase-money; which is the only test with respect to the validity of the sale. But the purchaser is never so bound, unless there be a lien; the objects specified; or the property impounded by a suit. Sugd. L. Vend. 367, 373; 6 Ves. 654; 1 Madd. Ch. 352.

Such are the rules, even where the will directs, in terms, that the land shall be sold; and the argument is *a fortiori*, where the charge is a mere creature of equity raised out of indefinite words, of no effect at law, and only commensurate to an end, which may be served as well by turning the creditors upon the proceeds.

Macon's right to the estate, then, cannot be disturbed, as the charge was general, and no steps had been taken by Campbell to enforce it. For the suit in the court of appeals had no effect, because the decree was against the executor only, and the bill did not seek to charge the land.

But, if all this were less clear, the claim of Campbell would



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be no impediment to relief. 1. Because, if the release of Broadneck and Foster's was before the making of the obligation, Brooke was deceived, as he was not apprized of it; and if it was afterwards, as it probably was, that alone was a discharge in equity. 2. Because Page was substituted in the room of Aylett, without the consent of Brooke, who was consequently absolved, as a different associate was imposed upon him. 3. Because Campbell's agent released Page's representatives, which discharged the whole obligation, especially as Page had given up part of the indemnity property, without consulting Brooke, whose security was thereby lessened. 4. Because Campbell did not pursue Price, but suffered the personal estate to be wasted.

The result is, that the plaintiff can make a good title.

Which leads to the inquiry, whether he has abandoned the contract, or done any thing to forfeit it?

Neither has happened.

He has not abandoned it. Because the suit was commenced immediately after the defendant's offer to relinquish, and has been constantly pursued ever since.

He has not forfeited it. Because the plaintiff proceeded, without delay, to get up the incumbrances, and has the legal estate now at command.

The third question is clearly with the complainant—1. Because the estate belonged to Macon from the time of the contract, and the vendor had nothing to do with future contingencies. 2. Because it is like the annuitant's dying before he receives any thing, or an exorbitant price given for property; neither of which, unless there be fraud or surprise, will bar specific performances. 1 Bro. Ch. 156; 3 Bro. Ch. 605; 1 Cox's Cas. 428; 3 Ves. & Beame, 187.

It follows, that as the plaintiff can convey a good title, there is nothing to prevent a specific execution of the contract. Gibson v. Patterson, 1 Atk. 12.

*Call*, for the defendant. The validity of Campbell's debt is  
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established, both by the decree of the court of appeals, and the evidence. *By the decree:* 1. Because the executor represents the personal estate, and is the proper party to sue and be sued respecting it. Co. Litt. 209, *a*; 2 Saund. 137, *b*; Ibid. 72, *a*. 2. Because, in collateral charges, judgment against the principal is conclusive, unless fraud be shown, as the debtor (who is the executor in the present case), is the proper person to contest them. 3 T. Rep. 374, 377; 1 Wash. 33; Skin. 586; 1 Eq. Cas. Abr. 315, *pl.*; 2 Prec. Ch. 198. 3. Because there is privity between the heir and executor; for the case of *Mason v. Peter*, 1 Munf. 487, proceeded upon an erroneous principle. Co. Litt. 232, *a*; 10 Co. 93. *b*; 1 Mod. 225; 1 Maule & Selw. 364; Plowd. 430. 4. Because it is substantially a judgment *in rem*; for whenever the sentence is against the proper person to prosecute or defend, the right is ascertained, and cannot be drawn into question again. 4 Bro. Parl. Cas. 718; Cro. Car. 167. *By the evidence:* 1. Because the obligation has not been weakened by any of the events insisted on by the plaintiff's counsel: *Not* by the substitution of Page, for that was not only *nudum pactum*, but collateral in terms, and disturbed nothing. 8 T. Rep. 168: *Not* by the release to Page's representatives. 1. Because there was an express reservation of the right to pursue Brooke's estate. 2. Because the release of part of the indemnity property, by Page, did not injure Brooke; for his rights were not affected by it. 3. Because neither Aylett nor Page, as between them and Brooke, was bound to pay more than half of the debt; and, consequently, when the representatives of Page paid a moiety, the discharge given to them was of no prejudice to those of Brooke. 6 Ves. 605; 1 Marsh. Rep. 603: *Not* by the failure to pursue the personal estate of Brooke. 1. Because Price could not be proceeded against until the mortgaged subject had been discussed; and he died before the pursuit was over. 2. Because, delay in pressing the personal estate does not discharge the heirs. 1 Anstruth. 112. That the obligation does not bind the heirs is unimportant, because the will subjects the land to payment of the testator's debts, and that in question was

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the debt of Aylett and Brooke. For the correspondence shows, that their undertaking was to be the price of Campbell's release of the mortgaged lands. The consequence is, that Macon was not bound to complete his purchase. For such contracts are always upon the implied condition, that the vendor has a good title, 2 Black. Rep. 1078; and Smith's deposition (which may be used to rebut the plaintiff's equity, 1 Cox's Cases, 406; 1 Ves. & Beame, 527), proves that a clear title was part of the actual bargain in this case. But the plaintiff cannot make a title. 1. Because the contract was not carried into effect before Macon received notice, followed by a suit, that Campbell claimed satisfaction out of the land, and it is not material, if no conveyance has been made, whether the notice and suit be before or after the contract; for, in either case, any further proceeding with the purchase, amounts to collusion between the executor and the purchaser. 2 Vern. 116; 1 Eq. Cas. 358, *pl.* 4; 3 Bro. Parl. Cas. 5; 9 Mod. 418; 5 Ves. 722. 2. Because Garnett did not act under the charge in George Brooke's will, but professed to proceed under that of Richard, which was fraudulent as to the creditors of George, and, therefore, the plaintiff could neither convey, nor the defendant obtain, a sure title under him. 3. Because all the necessary releases have not been procured, for the creditors of William Brooke are interested in the mortgage to Young and Gaines, as Richard Brooke died indebted to that estate, and Price's judgment still binds the Mantapike land. 4. Because, if it be true, as insisted, that Keith's suit can never be tried, from the impossibility of convening the parties, that circumstance is an additional argument for the defendant, as it keeps the title in perpetual suspense. But it is not true, for whenever the personalty cannot be conveniently discussed, the Court will proceed forthwith against the real estate. *D'Aranda v. Whittingham*, Moseley's Rep. 84. If, however, the title could now be rendered valid, Macon would, nevertheless, be released. 1. Because there was an improper concealment: for the plaintiff did not inform the vendee of Campbell's suit and Brooke's

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will, although Smith's deposition proves that he had notice of the first, and his connexion with the estate must have apprized him of the second. Coop. Rep. 308; 18 Ves. 10. 2. Because there was not only actual inability, at the time, to convey the legal estate, but just cause to believe that the title would be disputed, and a purchaser is never bound to take a litigated title, because it is a species of maintenance, and may involve him in controversies with third persons, who ought not to be unnecessarily drawn into litigation. Sugd. L. Vend. 158; 2 Schoales & Lefroy, 553, 560; 2 Ves. & Beame, 148; 16 Ves. 274; 1 Jacobs & Walk. 547; 5 Ves. 187, 647; 14 Ves. 547. 3. Because it comes too late, for the purchaser is not bound to wait an unreasonable time. 10 Ves. 606; 4 Ves. 689; 5 Ves. 730; 1 East, 627; 2 Meriv. 140. And the cases which speak of ability to convey at the moment of the decree as sufficient, must have been cases of formal obstruction only, for whenever danger of eviction is to be apprehended, the purchaser is not bound to complete, especially in this country, where expensive improvements will necessarily be contemplated, and where the opinion seems to be, that the vendee, upon eviction, can only recover his purchase-money and interest, without regard to expenditures. 5 Cranch, 276, 279. 4. Because the conduct of the plaintiff amounted to abandonment, for he did not insist upon performance, but paid Bagby for the wheat, kept possession of the estate, delayed to file his bill, and was unusually negligent with regard to the service of his writ. All this afforded a presumption that the abandonment was acquiesced in, and justified Macon in turning his attention to other objects. 4 Bro. Ch. 331, 471, 497. But, in no event ought the defendant to pay interest, for the profits go against it, as Garnett was in possession without being able to make a good title. 2 Taunt. 146.

*Hay*, on the same side. The contract must be considered as abandoned by both parties; for Macon expressly relinquished, by letter, which ought to have been promptly answered, and

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some decisive step taken, by the plaintiff, to show that he insisted on a fulfilment of the agreement. But nothing of that sort happened; for no deed was tendered, nor any demand made of that part of the purchase-money which became payable in January; and although a subpoena was taken out at an early period, the bill was not filed for several months afterwards, nor the writ served for more than twelve; although Garnett, in the mean time, had sown and reaped a crop of wheat upon the land. Under these circumstances, Macon had a right to presume that his abandonment of the contract was accepted, and to give himself no further concern about it. 4 Bro. Ch. 469; 5 Ves. 818.

It is incumbent on the vendor to make a clear title, and to be able to do so when he contracts; for the purchaser cannot be compelled to take a doubtful one, or to wait an unreasonable period for adjustment of difficulties respecting it. 2 Wms. 201; 5 Ves. 189; 16 Ves. 273; 2 Ves. & Beame, 149.

Under this view of the subject, Campbell's claim justified Macon's refusal to perform.

For it was a well-founded claim: 1. Because the decree of the court of appeals had established it; for the case of *Mason v. Peter*, 1 Munf. 437, is not law, as it turned upon the notion of a want of privity, which is completely refuted by the authorities already cited; and, in the case of *Mayo v. Bentley*, the court of appeals decided that a judgment, confessed by the administrator, was conclusive against every body. 2. Because the release of Broadneck and Foster's was purchased by Aylett and Brooke, with the obligation given by them; and, therefore, it does not lie in the mouths of their representatives to say, that it was not the debt of the obligors, against their own covenant founded on a full consideration.

Nor is that obligation in any manner impaired.

Surely not by the substitution of Page, for that was collateral, and could, at most, operate as an additional security; but, as it had neither seal nor consideration, it possibly had no operation at all.

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Nor did the release to Page's representatives affect the obligation; for the right to pursue those of Brooke was reserved; and the case *ex parte* Gifford, 6 Ves. 805, decides that an express release to one, upon payment of his proportion of the debt, does not discharge the rest of the obligors.

The debt, then, is not only still due, but has been shown to be the debt of Brooke and Aylett; and, therefore, it is expressly within the charge created by the will upon the land.

But if Campbell's claim had not been so well-founded, Macon would still have been at liberty to resist the contract. 1. Because it had been decided, by the court of appeals, that the claim was just; and he could not have delivered himself from embarrassment by paying the money either to the plaintiff, or to Campbell; for, as he had received notice that the debt would be asserted against the land, he would have proceeded at his peril to pay to the former; Sugd. L. Vend., 530; and, if he had paid to the latter, he would have run the risk of having to pay it over again, if the contract should be preferred to Campbell's claim, or that claim should not be established. 2. Because the primary liability of the personal estate threatened to protract the contest to an immeasurable length, so as to keep him in perpetual suspense, and put it out of his power either to go to market with the property, or to dispose of it among his family: a difficulty to which he ought not to have been exposed; and, as specific performance is discretionary with the Court, the jurisdiction should not be exercised against an innocent purchaser, brought into the dilemma through the fault of the vendor; especially as Mantapike has greatly depreciated, and Macon, who was diverted from his efforts to sell the plantation in Hanover, which has since fallen in value, must make great sacrifices to raise the purchase-money.

However, it is useless to insist any farther upon these points, as the mortgages given by Richard Brooke have not been completely released, and Price's judgment still binds the land. For those incumbrances put it out of the power of the plaintiff to make a good title, and therefore he is not entitled to relief.

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*Leigh* for the plaintiff said, that, in the reply, he should insist, 1. That as the obligation of Aylett and Brooke did not bind their heirs, Campbell's claim, if it were the debt of Brooke, would be no objection to a specific performance, because the charge in the will was indefinite, and the contract made before notice of the debt. 2. That the release of Brodneck and Foster's by Campbell, was subsequent to the obligation, and therefore destroyed it, as Aylett and Brooke were not consulted. 3. That the substitution of Page for Aylett released the whole obligation, because a court of equity would have compelled a general release to Aylett, and that would have operated as a release to Brooke also. Co. Litt. 232; Wats. L. Partn. 226; 5 Bac. Abr. 167. 4. That as Price's answer to the suit in the court of appeals does not deny assets, it admitted them, and therefore the failure to pursue him was culpable negligence. 5. That the release to Page's representatives was a complete discharge to those of Brooke.

*Wickham*, for the defendant. The decree of the court of appeals is conclusive; for, if it had been in favour of Price, the heirs and devisees of George Brooke would have been discharged; and the rule must be reciprocal.

The case of *Mason v. Peter*, 1 Munf. 437, does not resemble this; for that was a judgment by default; this a full defence upon the merits by the executor.

But independent of the decree, the cause is in favour of Campbell. For it is of no consequence whether the covenant binds the heirs or not; because the will charges the land with the payment of all the testator's debts, and not those only where the heir and executor are both bound. But as the covenant proves that Brooke owed the debt, the case is necessarily embraced within the terms of the devise.

The substitution of Page for Aylett, did not release Brooke, as the case cited from 8 T. Rep. 168, shows; for it was a mere collateral undertaking, which did no injury to Brooke, as his

situation was not altered by it; and he might, if Aylett had failed, have even derived benefit from it, as Page, in that case, must have assisted to pay the debt.

This is an answer to all that has been said relative to the release to Page's representatives; for that was beneficial to those of Brooke, as it relieved them from all responsibility for Aylett's moiety, to which extent only was Page bound, even at law, and, therefore, it was but a new acknowledgment of their having fulfilled his engagement, which, in effect, was no more than to pay one half of the debt, and his representatives having done so, they were discharged, whether an actual release was given or not; for, to use Mr. Leigh's own argument, a court of equity, as they were no farther liable, would have decreed one to be executed. It is therefore not like Co. Litt. 232, and the other authorities cited by him, because it was not a release of the original obligation, but of Page's own undertaking, and Aylett was left bound as he was before.

But the other view which has been taken of this part of the case by the defendant's counsel, is equally clear, for the release expressly reserves the right to proceed against Brooke's representatives, who, consequently, continue liable, according to the cases cited from 6 Ves. 805; 1 Marsh. Rep. 603.

There was no delay in pursuing Price; but if there had, it would not have been material, as the responsibility of the devisees arose from the charge in the will, and the creditor was not bound to prosecute for their indemnity. *Croughton v. Duval*, 3 Call, 69. Besides, Campbell was out of the country, and his course was impeded by the death of parties, and other obstructions.

It is of no consequence that the personal estate is first liable, for it does not appear that it can be ascertained whether there be any which can be made effectual, and a purchaser is not to be kept in suspense forever.

Macon could not have paid the purchase-money with safety, for, after the notice, he was bound to see to the application of



it. Besides, Garnett's suit created a *lis pendens*, which was followed by those of Campbell and Keith; and the whole together rendered performance, to the last degree, perilous.'

Campbell's equity is both prior in point of time, and derived from the highest source; for Garnett's trust is for the representatives of Richard Brooke, and not for the creditors of George Brooke, to whom the land belonged, and who created the charge, that his own debts might be paid before his devisees took anything.

But this upright intention would be defeated by the doctrines contended for by the plaintiff's counsel. For if Garnett had received the money, and paid it over to the legatees of Richard Brooke, he would not have been liable for it, because he would have acted in discharge of the trust committed to him, and there was no confidence between him and George Brooke.

Another view of the subject makes the case clear. Richard Brooke mortgaged the land, and that put it out of the power of Garnett to convey the legal estate, as he had only the equity of redemption. But Campbell's prior claim gave him the first right to redeem.

This refutes the notion that Macon had the best right to call for the legal estate. For if Garnett were now to obtain complete releases from all the mortgagees, and to convey to Macon, the prior right of Campbell would overreach him.

The argument that Macon may pay the money into Court, and leave Garnett and the creditors of George Brooke to contest the right to it, is unsound:—1. Because the price will not pay Campbell's debt, and, therefore, if the land should rise in value, Keith will have a right to insist upon a re-sale, in order to obtain the benefit of the rise. 2. Because payment into Court would only bind the parties to this suit, and not the other creditors of George Brooke who may join in Keith's suit, and claim to have the land sold again.

Surrounded with such difficulties, none of which were known to him at the time of his purchase, Macon has a right to say,

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"*non hæc in fœdera veni.*" My contract was for a clear title, not for one embarrassed with endless disputes.

If there be a well-grounded apprehension that the litigation will be protracted, and the property locked up for a long time, the Court will not compel execution of the contract, because the vendee will not be able to improve with safety, or go to market with the estate.

Courts, in order to prevent controversies and loss, will sometimes enjoin trustees from proceeding to sell where other incumbrances exist. The present contract, therefore, will hardly be enforced, if performance would only lead to new litigation.

The circumstances, in the case of *Gibson v. Patterson*, 1 Atk. 12, do not appear; but it is certain that the rule of courts of equity, upon questions of this sort, has undergone a considerable change, and that the old cases differ widely from the modern, in respect of the period of performance.

The foundation of this kind of bills for specific execution, where other persons than the contracting parties are made defendants, is simple. It is to remove formal obstructions, when the title is otherwise clear, in order that the purchaser may hold the estate without danger of interruption. But that is not the case here, for the same embarrassments will continue after the decree as before, the obstructions not being formal only, but such as the Court itself cannot remove.

The vendor should be able to show both that his conduct has been fair, and that he has been guilty of no *laches*. But Garnett is not in that situation, for he has sold an estate subject to incumbrances, without apprizing the purchaser of them; and if it was in his power to remove them, he has not used due diligence to effect it: not even in the prosecution of this suit, although professedly brought to clear the title.

Compare the conduct of the parties. Garnett was bound to offer a complete title, or to disclose the defects; but he did neither, for he was not able to convey a good title, nor did he apprise the purchaser that it was defective; even Young's

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mortgage was represented as small, and, with respect to the rest of the incumbrances, formidable as they are, nothing was said.

Macon's conduct, on the other hand, has been unexceptionable. Confiding in Garnett's representation that it was a clear title, he paid \$4000 of the purchase-money before it was demandable, and was preparing to fulfil the contract in all other respects, until he received notice from Govan, that he would proceed at his peril, upon which he abandoned the agreement, and gave notice to the defendant, who was not injured by it, as he was thereby enabled to clear the title if he could, and go to market again with a sure estate.

If, however, performance should be decreed, interest ought not to be allowed, as the title was in controversy, and the plaintiff had possession of the estate.

*Leigh*, in reply. Four objections are made to a specific performance:—1. That the contract was abandoned by the plaintiff. 2. That there was *laches* in prosecuting the suit and removing incumbrances. 3. That there has been a change of circumstances, in consequence of a fall in the value of the property. 4. That there are existing incumbrances now upon the estate.

There is not a shadow of reason in support of the first, for the suit was brought immediately on the receipt of the defendant's notice; and if no deed was tendered in January, it was because he had refused to proceed, and it was his duty to have prepared one. *Sudg. L. Vend.* 182.

The second objection is equally as untenable, for the suit was constantly going on, and there was no delay in getting up the incumbrances; but if there had, it would not have been material, for time is not of the essence of the contract in any case, unless expressly stipulated. *Sugd.* 282, 289, 293; 5 *Cranch*, 262; 1 *Wheat.* 179; 14 *Ves.* 205, and much less in this, for a clearing of the title within the limit of the instalments was all that was looked for upon a fair construction of the agreement,

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compared with Smith's deposition. Besides, ability to convey at the time of the decree is all that is ever required, and more ought not to be insisted on here, as the incumbrances were not, in fact, known to the plaintiff at the time of the contract ; Sugd. 229 ; and, if there was any room for constructive notice, the purchaser was as much bound to search for it as the vendor. Sugd. 336.

With respect to the change of circumstances, and fall in the value of the property, nothing favourable to the defence can be drawn from that source, for it has long been settled, that objections of that kind have no weight, any more than the premature death of the annuitant, or the inadequacy in the price of the property in the cases cited by Mr. Stanard, from 1 Bro. Ch. 156 ; 3 Bro. Ch. 605 ; 1 Cox's Cas. 428 ; 3 Ves. & Beame, 187. Indeed, inadequacy of price would appear to be the stronger objection, because it might, with some plausibility, be urged as a fault in the bargain itself ; but the subsequent fall in value is unconnected with the agreement, and ought not to affect a *bona fide* transaction.

The fourth objection is of a three-fold character : the mortgages, Price's judgment, and Campbell's claim ; but none of them are sufficient to repel a specific execution of the contract, for the mortgages have all been released ; or if any thing still remains to be done, it may now be decreed, as all necessary parties are before the Court, which has always been considered as sufficient, because the title is assured by the decree, and that is the same as if the plaintiff possessed it. 16 Ves. 380.

Price's judgment is as little to be regarded, for the prior mortgage of Young prevents it from fastening on the legal estate, and it cannot affect the equity of redemption as a specific lien. Pow. Mortg. 339, 340, 615, 620 ; 3 Bro. Ch. 480 ; 1 Ves. Jr. 431 ; 1 Cox's Cas. 160.

Campbell's claim, therefore, is the only pretext left ; but that has no influence, for it was not a specific lien, but a mere charge which might or might not become operative ; and therefore, if the purchase-money had been paid, and a conveyance taken

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before notice, it is admitted that the vendor could not have been disturbed. But the notice *in pais* makes no difference, for in cases of general charge without a lien, any other notice than a *lis pendens*, is immaterial, because the proceeds of the sale are assets, and the price of the land is all that the creditors are entitled to. 1 Eq. Cas. Abr. 358, *pl.* 2; 1 Anstr. 109; Ambl. 676. The force of this is not weakened by the argument that the contract is still executory, for the equity looks upon things agreed to be done as actually performed, and when an agreement is entered into for the sale of an estate, it considers the purchaser as the true owner from the date of the bargain; consequently the sale in the present case is good against the charge, as the purchaser was not bound to see to the application of the purchase-money, and was complete owner of the land at the moment of closing the contract, as there was no *lis pendens* at the time. Sugd. 130; 2 Wms. 277; 1 Bro. Ch. 186; 3 Bro. Ch. 96; 16 Ves. 151; Sugd. 372. Nor is it material that Garnett was not a trustee appointed by the will of George Brooke, for he had authority to sell, and the proceeds of the sale will be as available for the creditors as the land itself would have been.

The cases cited by the defendant's counsel, to prove that a purchaser is not bound to take a doubtful title, do not conflict with our right to a specific execution, for that of *Rose v. Calland*, 5 Ves. 187, was a case where there was a perpetual appropriation of hay not disclosed in the contract, but which, according to a doctrine settled in the court of exchequer, was attached to the estate. That of *Stapylton v. Scott*, 16 Ves. 272, was a case where the executor sold the whole property, when the devise was that he should sell the testator's own moiety, and his interest only in the rest. *Sloper v. Fish*, 2 Ves. & Beame, 145, was a doubtful question whether the deed was absolute, or had been delivered as an escrow only. *Jervoise v. The Duke of Northumberland*, 1 Jacobs & Walk. 540, was a case of uncertainty as to the nature of the estate. *Lowes v. Lusk*, 14 Ves. 547, was a question of great doubt, whether the sale had not been anticipated by an act of bankruptcy. *Cooper v. Denne*,

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4 Bro. Ch. 80, was a case where it was uncertain whether the leases had been confirmed, without which they were clearly void. Shapland v. Smith, 1 Bro. Ch. 75, was a case where there was a doubt whether there was a good tenant to the *præcipe*, and the chancellor was of opinion there was not. Walker v. Smallwood, Ambl. 676, was the case of a *lis pendens*, and therefore has nothing to do with this case. Green v. Lowes, 3 Bro. Ch. 217, was an injunction upon motion before answer, without any decision upon the merits; and Sugd. 243, is his own inference only, and therefore is of no importance.

The decree of the court of appeals does not conclude the plaintiff. Mason v. Peter, 1 Munf. 437, is expressly otherwise; and the authority of that case is not lessened by Mr. Wickham's argument, that as the heir may avail himself of a judgment in favour of the executor, he is bound by one against him; because that turns upon the principle, that the claim is entirely destroyed by the judgment.

The release of Broadneck and Foster's discharged Aylett and Brooke; for Braxton's letter proves that it was subsequent to the obligation.

But, if that were not so, the substitution of Page had that effect as to Brooke clearly; for equity would have decreed a release to Aylett, which would have discharged Brooke, as Page would have been left bound instead of Aylett, with whom he was associated in the obligation.

If, however, that were doubtful, the release to Page's representatives discharged those of Brooke, upon a known principle of the common law. Co. Litt. 232 *n.* 1, which is not impugned by the case *ex parte* Gifford, 6 Ves. 805, and Hutton v. Eyre, 1 Marsh. Rep. 603; for they were cases of composition with insolvents and partners, and therefore not like this.

Campbell's representative has lost all pretensions against the real estate of Brooke, by the failure to pursue the personal effects in the hands of Price; for as the latter did not deny assets in the suit in the court of appeals, he admitted them, and there-

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fore, it was the duty of Campbell to have made that fund effectual.

But, in any view of the case, the personal estate must be first discussed, Sugd. 378; and, if, through the supineness of his predecessor, Keith should meet with any difficulty in the pursuit of it, he must resort to the securities upon the administration bond.

Interest is always decreed upon the purchase-money, and the purchaser is only entitled to credit for the profits actually received.

**MARSHALL, C. J.**—Richard Brooke, by his last will, empowered his executors to sell his whole estate, and William Garnett, the plaintiff, alone proved the will, and took the executorship upon himself.

On the 10th of June, 1818, William Garnett sold the estate called Mantapike, to William H. Macon, the defendant, “for the sum of twenty-two dollars per acre, \$6000 of which are to be paid on the 1st day of January next, when possession will be given, and the balance in two equal annual payments from that date, which said two last payments are to be secured by mortgage on the said land. The said William Garnett farther agrees to put the present cornfield land in wheat, the said William H. Macon furnishing the seed. And it is farther agreed, that the said William H. Macon is to have power to make this agreement valid in one month from the date hereof, or to make the same null and of no effect, by giving due notice to the said William Garnett to that purport, within the time aforesaid.”

On the 22d of August, William H. Macon paid William Garnett, \$4000 in part of the first payment; but having received notice afterwards, that George Brooke, who devised Mantapike to Richard, had by his last will, charged his whole estate with the payment of his debts; and had in his lifetime, become surety for Carter Braxton in a large sum, to Robert Campbell, for which a decree had been pronounced in the court of chancery against Carter Braxton, Robert Price, ex-

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ecutor of George Brooke, and against the representatives of Robert Page, who was also surety for Carter Braxton, which decree was affirmed in the court of appeals in October 1799, and remains unsatisfied; and being advised by counsel, that he, having notice thereof, the estate called Mantapike, would be charged with the said debt in his hands, he, on the 16th of December, addressed the following letter to the plaintiff:

“SIR—I am informed that Colonel George Brooke, the former owner of the Mantapike tract of land, became Carter Braxton's security for a large debt to Robert Campbell, and by his will, charged his lands with the payment of his debts; that the debt to Campbell is still due, and that the Mantapike lands are liable to be sold for the payment thereof. I, therefore, think proper to inform you, that I consider the contract which I made with you for the purchase of the said tract of land, as void, and request you to return me the \$4000 which I paid you, in part of the purchase-money, with interest.

“I am, sir, very respectfully,

“W. H. MACON.”

On the 26th of the same month, William Garnett instituted his suit in the court of chancery of the state, against William H. Macon, and against the representatives of Robert Campbell, praying for a specific performance of the contract, and insists in his bill, that the estate called Mantapike, would not be chargeable with the debts of George Brooke, in the hands of a purchaser; and insists, also, for several reasons which are detailed at length, that George Brooke was not liable for the debts to Campbell, and that his devisees were not bound by the decree against his executor, or estopped from contesting the claim.

The chancellor was of opinion, that Brooke had been released by the conduct of Campbell, and that a specific performance of the contract ought to be decreed, and directed an account of the rents and profits of the estate received by the plaintiff since the sale; but information was received of Campbell's death, on



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which the suit abated as to him, and was revived against William Keith, his representative, who appeared and petitioned that the cause should be removed into this Court, which was ordered accordingly. Keith, as the representative of Campbell, has also filed a bill against the representatives, heirs, and devisees of George Brooke, praying that his debt may be paid; and to this bill William H. Macon is made a defendant: but this suit is not ready for trial.

In May 1820, William H. Macon filed his answer, in which, he insists that he ought to stand discharged from his contract, on account of the lands being incumbered with Campbell's debt, of which he had no notice, and that he purchased, "supposing the said Mantapike tract of land was free from incumbrances and charges of all kinds, except a mortgage by Richard Brooke to General Young, which was represented as of no great amount, and which the complainant was to pay off before he made a deed for the land to this defendant, but has failed to do so, as this defendant understands."

He says, that on examining the records, which he did, in consequence of receiving notice of Campbell's debt, he found the question to be so perplexed and intricate, that the controversy would probably not be determined during his life, in consequence of which he resolved to abandon the contract, and addressed a letter to the plaintiff giving notice of his resolution. That in consequence thereof, as he presumes, the complainant kept possession of the tract of land; failed to tender a deed to the defendant for it, or to demand the instalment in January 1819, and paid for the seed-wheat, which Macon had purchased to seed the cornfield, according to the written contract; thus exhibiting every mark of a reciprocal abandonment of the contract on his part, and he gave no indication to the contrary till the institution of this suit, several months afterwards.

In argument, the first point which has been made by the defendant Macon is, that the contract was abandoned by both parties.

It is not pretended that there has been any express or formal

abandonment on the part of the plaintiff. The allegation is, that it is to be implied from his conduct. To sustain this implication, the conduct of the vendor ought to be such as to justify a reasonable man in believing that he acquiesced in the decision of the vendee, to abandon the contract; it ought to be such as might reasonably influence the conduct of the vendee, and induce him to regulate his own affairs on the presumption that it was no longer incumbered by his contract. The attempt of the vendor to re-sell the estate, or the unequivocal exercise of ownership over it, unaccompanied with any explanation showing that he still considered the contract as binding, might be such an act; but there has been no attempt to re-sell the estate, nor any unexplained act of ownership over it. On the contrary, a subpœna was taken out within ten days after the date of the letter of abandonment, and the bill, since filed in consequence of this subpœna, claims a specific performance.

Had the bill been immediately filed, and the subpœna executed, this point, it is presumed, would not have been made; but the bill was not filed until June 1819, and the subpœna was not returned executed until January 1820.

From these circumstances, the counsel for the defendant claim the same advantages to their client, as if the plaintiff had acquiesced silently in his letter of the 16th of December, 1818, until the service of the subpœna informed him that a suit was depending. But I do not think that this claim can be supported.

No *laches* are imputable to the plaintiff. His determination to insist on the contract, seems to have been immediate; and the measures taken by him in pursuance of that determination, were sufficiently prompt. A subpœna was issued on the tenth day after the date of Colonel Macon's letter, but there was not time to execute it. New process was directed, and the law makes it the duty of the officers of the court, to attend to that process. I do not think the delay which took place in executing it, can be justly imputed to Colonel Garnett, nor ought any forfeiture of right to be the consequence of that delay, unless some injury to Colonel Macon had resulted from it. No injury

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is shown or alleged, nor is it probable that any can have arisen. From the vicinity of the two gentlemen to each other, their rank in life, the common conversations which grow out of such controversies, the interest which the parties took in it, and the inquiries they would naturally make, it is not reasonable to suppose, that while the vendor was in fact actively pressing his suit, and continually issuing new process, the vendee could act upon the presumption that he had abandoned his contract. But if these circumstances, which generally accompany transactions of this character, cannot be considered as belonging to this cause, the record, I think, furnishes satisfactory evidence that Colonel Macon was apprized of the determination of Colonel Garnett to insist on the specific performance of the contract. Thomas G. Smith deposes to a conversation with Colonel Macon, in which that gentleman said, that though the counsel consulted by him had been of opinion that Mantapike was bound for Campbell's debt, the counsel consulted by William Garnett had advised otherwise, and that William Garnett said, he did not think himself at liberty, as a representative, to cancel the bargain.

The deposition of James M. Garnett, too, though less explicit, bears on the same point. The very fact, that the vendee did not repeat his demand for repayment of the \$4000 he had advanced, shows that he did not suppose the vendor had relinquished the contract.

Since, then, the vendor did never in fact relinquish the contract, but took early measures to enforce its specific performance; since the delay which took place in the service of process did not proceed from him, and did not produce any real mischief to the vendee, I cannot think that the right to enforce a specific performance is in any degree affected by that delay.

It has been also argued, that the vendor ought to have done all that was required from him by the contract. He ought to have tendered possession and a conveyance, on the 1st of January, 1819.

He certainly might have done so. But when it is recollected

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that previous to the 1st of January, 1819, he had received a letter from the vendee, announcing his determination not to receive possession or a conveyance, and had himself resorted to the laws for that remedy, which they afforded for a broken contract, I cannot think that the omission, if it may be so termed, ought to vary that remedy, so far as respects a specific performance, whatever might be its influence on other questions which would arise in the cause, should the contract be carried into execution.

I come now to consider the validity of the objections made by the vendee to a specific performance of the contract, supposing it not to be abandoned. He complains, that the title is incumbered and embarrassed with liens, of which he had no knowledge when the contract was made, and which would certainly have deterred him from making it, had they been communicated to him.

A court of equity compels the specific performance of contracts, because it is the intention of the parties that they shall be performed. But the person who demands it, must be in a capacity to do, substantially, all that he has promised, before he can entitle himself to the aid of this Court. At what time this capacity must exist, whether it must be at the date of the contract, at the time it is to be executed, or at the time of the decree, depends, I think, upon circumstances, which may vary with every case. There is no subject which more requires the exercise of a sound discretion. The inquiry in every case of the kind must be, whether the vendor could at the time have conveyed such a title as the vendee had a right to demand? If he could not *then*, whether he can *now*? And if he can, whether there has been such a change of circumstances, that a court of equity ought not to compel the vendee to receive it? The first and great objection to the title, is the lien supposed to be imposed on the Mantapike estate, by the will of George Brooke, for the payment of his debts.

In the year 1781, George Brooke made his last will in writing, in which he devised as follows: "After my just debts are

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paid, I give and dispose of the remainder of my estate in the manner following, &c." The testator was then seised and possessed of Mantapike, which he devised to his son Richard. Richard Brooke entered upon the property devised to him, and remained in possession of it until his death, which happened in the year 1816. By his last will, he empowered his executors, or such of them as might act, to sell his land. William Garnett, the plaintiff, alone qualified as executor to the will, and sold the land to the defendant, William H. Macon, without any intimation of the existence of Campbell's claim, or that George Brooke had charged his land with the payment of his debts.

He now contends that this claim constitutes no obstacle to a specific performance of the contract, because:—*First*, It was not one of George Brooke's just debts, at the date of his will or at the time of his death. *Second*, If it was a just debt, it does not charge the estate in the hands of William H. Macon.

*First*, Is the claim now made by Keith, on the part of Campbell, for a debt legally due from the estate of George Brooke, deceased?

As the suit for that claim is now pending, and is not yet ready for hearing, any positive decision respecting it would, perhaps, be premature. It is, however, in the power of the Court to form opinions on some points of that case, subject, indeed, to future revision; because the facts on which those points must certainly depend, are in the record; and it may be proper to do so, because, if the claim be obviously unfounded, the course of the Court would be different from what it ought to be, if any strong presumptions exist in its favour.

The defendants insist that the decree against the personal representatives of George Brooke is conclusive evidence against his devisee of the existence of the debt.

The cases cited by counsel, in support of this proposition, do not decide the very point. Not one of them brings directly into question the conclusiveness of a judgment against the executor, in a suit against the heir or devisee. They undoubtedly show that the executor completely represents the testator, as the legal

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owner of his personal property, for the payment of his debts in the first instance, and is, consequently, the proper person to contest the claims of his creditors. Yet there are strong reasons for denying the conclusiveness of a judgment against an executor in an action against the heir. He is not a party to the suit,—cannot controvert the testimony,—adduce evidence in opposition to the claim,—or appeal from the judgment. In case of a deficiency of assets, the executor may feel no interest in defending the suit, and may not choose to incur the trouble or expense attendant on a laborious investigation of the claim. It would seem unreasonable that the heir, who does not claim under the executor, should be estopped by a judgment against him.

In the case against Munford's heirs, in this Court, the question was decided against the conclusiveness of such a judgment, and I am not satisfied that the decision was erroneous.(1)

This case, however, varies from that, in a material circumstance. In that case, the heir was bound by the obligation of his ancestor, and was liable to the creditor directly. In this case the creditor is bound to proceed against the executor, and to exhaust the personal estate before the lands become liable to his claim. The heir or devisee may, indeed, in a court of chancery, be united with the executor in the same action, but the decree against him would be dependent on the insufficiency of the personal estate. Since, then, the proceeding against the executor is, in substance, the foundation of the proceeding against the heir or devisee, the argument for considering it as *prima facie* evidence may be irresistible, but I cannot consider it as an estoppel. The judgment not being against a person representing the land, ought, I think, on the general principle, which applies to giving records in evidence, to be re-examinable when brought to bear upon the proprietor of the land.

It was said, but not pressed, by the counsel for the plaintiff,

(1) See the case of Alston et al. Executors of Mutter v. Munford et al., reported *ante*, Vol. I.—[Editor.]

that the decree of the court of chancery was not even *prima facie* evidence against the representatives of George Brooke. I do not concur with him in this proposition; but if I did, it would not, I think, materially affect this case. The decree was against Braxton, as well as against the representatives of Brooke and Page, and is admitted to be conclusive against Braxton and his representatives. They could never be permitted to deny that Braxton owed Campbell the money specified in that decree.

The undertaking on which the decree was pronounced against Brooke's executor, is dated in 1775, and promises, under seal, to stand security for Braxton to Campbell, for the sum then due. This sum is fixed by the decree against Braxton, and the defence now set up for Brooke does not controvert that decree as to Braxton, but insists on several circumstances which, as they contend, discharge Brooke from the liability incurred by his undertaking, as Braxton's surety.

The first of these is, the release of Broadneck, which had been mortgaged for the debt, in 1769, when the bills drawn by Braxton and sold to Campbell came back protested. William Aylett and George Brooke became sureties to Campbell for this debt.

On the 21st day of May, in the year 1773, Campbell joined Braxton in a conveyance of the mortgaged premises to John Shermer, which is recorded in September, of the same year. On the 15th of December, 1775, Aylett and Brooke transmit to Campbell an instrument of writing, under seal, which, after reciting a former undertaking as sureties for Braxton, contains these words: "We, therefore, in consideration of our former agreement, do promise and oblige ourselves to stand security for the said Braxton to the said Campbell, his heirs, executors, administrators, and assigns, for the sum of money now due from the said Braxton to the said Campbell."

It is contended for the plaintiff, that this suretyship was probably undertaken in the confidence that the mortgaged pro-

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perty was amply sufficient to discharge the debt, and that Campbell, by releasing this property without the consent of the sureties, discharged them.

There would be great force in this objection, had the release of the mortgaged premises been dated subsequent to the engagement made by Aylett and Brooke. But that engagement was dated in December, 1775, and the deed of conveyance by Braxton and Campbell to Shermer, was recorded in September, 1773. No evidence exists that either the mortgage or its release was communicated to Aylett or Brooke, other than the presumption arising from the notoriety of such transactions, and from the fact that both deeds were recorded. These circumstances are precisely as strong to prove a knowledge of the deed to Shermer, as of the deed to Campbell, were it even proved that the first bond of Aylett and Brooke anteceded the deed to Shermer. The undertaking made in December, 1775, cannot be presumed to have been induced by a deed of mortgage which had been released more than two years, and although it is expressed to be made in consideration of the prior undertaking, yet that prior undertaking would not have been renewed under circumstances, which, in the opinion of the parties themselves, absolved them from it, both in law and conscience. The fair inference from this renewal is, that the parties, being mutual friends, the conveyance to Shermer was with the knowledge and assent of all.

The second objection arises from a fact which is considered as an implied release of Aylett from his joint obligation with Brooke.

On that instrument is this endorsement :—" Aug. 6th, 1777, I do oblige myself to perform every engagement that Colonel William Aylett was bound by the within to perform, and to be considered as one of the securities of Mr. Braxton, in the room of Colonel Aylett. Witness my hand, this 6th day of Aug. 1777.

ROBERT PAGE."

It is contended, that this endorsement must be considered as



made with the consent of Campbell, who, from its terms, and from suing the representatives of Brooke and not of Aylett, must be considered as having agreed to discharge Aylett.

The inference is, I think, a fair one. The instrument always remained in possession of Campbell, who must be presumed to have been privy and assenting to the endorsement, and who has avowed it by his suit.

It is insisted, that the legal effect of this agreement is to discharge Brooke as well as Aylett, because the release of one joint obligor releases the other.

It is obvious that the release of Brooke was not contemplated by the parties. If such be the effect of the instrument, an operation is given to the words, which they do not naturally import, and which the parties could never have foreseen or intended. If a positive rule of law require such a construction, the Court must make it; but the construction can be justified only by a positive and well-settled rule. The common rule of law, and it seems also to be the rule of reason, is, that words shall subserve the intent; but when the reverse of this rule is to be adopted, and both the words and the intent of an agreement are to yield to a technical principle, that principle ought to be sustained by decisions of unquestionable authority, the application of which cannot be doubted.

The principle is, that a covenant never to put a bond in suit, is a release, and it is also settled, that a release to one of several obligors, is a release to his co-obligors.

Both these points have been frequently decided, and the plaintiff is certainly entitled to the benefit of those decisions, as far as they apply to his case.

The principle will be found in any abridgment,<sup>(a)</sup> or general treatise on the subject, with a reference to the cases which establish it. In no one of them does the obligation contain any other party than him with whom the covenant is made. In all of them, the covenant, if broken, gives a right of action to the

(a) See 5 Bac. Abr. title, *Release*, (A) 2 p. [683] *Ed. Gwil.*

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parties bound in the obligation, and the measure of their damages is given by the recovery of the obligee in his suit against them. If A. is bound to B. in an obligation, and they enter into a covenant, stipulating that it shall never be put in suit, notwithstanding which, B. puts it in suit, this breach of covenant gives A. an action against B., in which he must recover in damages, precisely the sum to which the judgment obtained by B. may amount. To avoid circuity of action, this covenant may be pleaded as a release.

Thus far the cases go, and if there be one which goes farther, I have not found it. To bring himself within their letter, Brooke ought to show a covenant, in which Campbell stipulates with Aylett and himself, never to put their bond in suit. To bring himself within their spirit, he ought to show some agreement giving him an action against Campbell, in which his right would be commensurate with any judgment Campbell might obtain against him. In such a case, and in such a case only, would the principle of the decisions relied on apply; because, in such a case only, the sole effect of leaving the instrument to operate according to its language, would be to produce circuity of action. In such a case, too, the parties can have no other intention than to defeat the obligation. It is the sole object and effect of their covenant. To construe such an instrument, then, as a release, is to give it the effect intended by the parties.

I think the proposition may be stated, without fear of its being disproved by the books, that a covenant containing no words of release, has never been construed as a release, unless it gave to the party claiming that construction, a right of action, which would precisely countervail that to which he was liable; and unless, also, it was the intention of the parties that the last instrument should defeat the first.

This general view of the precedents on which the plaintiff relies, would be sufficient to satisfy my mind that they do not apply to the case under consideration, had not the contrary opinion been urged at bar, with all the earnestness of conviction, and been supported by an authority, given on the case

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itself, which is entitled to the utmost respect. I shall, therefore, look farther into the question, and examine some cases and principles, which are adverse to the construction claimed by the plaintiff's counsel.

*Lacy v. Kynaston*, 2 Salk. 575; 12 Mod. 551; 1 *Ld. Raym.* 688, was in substance, this:—Articles were entered into by the members of a company of comedians, binding themselves to pay £ 100 to the representative of the plaintiff's intestate, who was a member of the company, within three months after his death, should he continue to act during his life. The action was brought against Kynaston, who was also a member of the company, and the declaration avers, that plaintiff's intestate did continue to act during his life. The defendant pleads in bar, articles subsequently entered into by the same parties, including the plaintiff's intestate, stipulating jointly and severally, that if the defendant Kynaston, should give notice of his intent to give over acting in said companies, he should be free and discharged of and from all debts, &c., entered into by him, on account of the company, and that the plaintiff's intestate, and the rest should save harmless and indemnify the defendant from all such debts, &c., or any matter or thing relating to the company. To this plea the plaintiff demurred, and the only question was, whether the articles amounted in law to a defeasance or release, or were to be construed only as a covenant. The court was of opinion that it was only a covenant, for several reasons, which are assigned in the opinion. In discussing the question, the principle, that a perpetual covenant amounts to a release, was particularly considered, and the reason given for construing such a covenant as a release, is to avoid circuitry of action—"Because," says the court, "there, one should precisely recover the same damages that he had suffered by the others suing the bond. A. is bound to B., and B. covenants never to put the bond in suit against A.; if, after, B. will sue A. upon the bond, he may plead the covenant, by way of release. But if A. and B. be jointly and severally bound to C. in a sum certain, and C. covenants with A. not to sue him, that shall not be a release, but a covenant only; because he covenants only not

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to sue A., but does not covenant not to sue B., for the covenant is not a release in its nature, but only by construction, to avoid circuity of action; for when he covenants not to sue one, he still has a remedy, and then it shall be construed as a covenant, and no more." The same point was determined in *Dean v. Newhall*, 8 T. Rep. 168, in which the authorities were reviewed at length, and a distinction of great importance taken, between an actual and a constructive release.

It has been insisted by the plaintiff's counsel, that these cases do not apply, because they relate to obligations which were joint and several, whereas the obligation of Aylett and Brooke was joint.

This objection merits consideration.

It is admitted to be law, that a release to one of several obligors, whether they be bound jointly, or jointly and severally, discharges the others, and may be pleaded in bar by all. 2 Saund. [48 a.] note; 2 Salk. 574; 12 Mod. 550. That the obligation is joint, or joint and several, then, can make no difference, if there be an actual release. The difference, if there be any, consists in the construction of the instrument. The same words, it may be contended, would amount to a release of a joint obligation, which would not release one which was joint and several.

Has this ever been so determined? I can only say, if it has, I have not found the case. In the absence of authority, the proposition must rest upon its reasonableness, and on analogy.

The reason assigned by the plaintiff in support of this distinction, is that which is given by the court in *Lacy v. Kynaston*. In case of an obligation which is several as well as joint, the plaintiff may still sue the obligor, to whom the covenant does not apply, without violating his engagement, or subjecting himself to a suit; whereas, if the obligation be joint only, both obligors must be joined in the action. There is certainly much in this argument which deserves consideration. Without admitting its conclusiveness, which I am far from doing, it is necessary, as an indispensable preliminary to its application to the cause at bar, to show that the endorsement on the bond of Ay-

lett and Brooke, amounts to an agreement on the part of Campbell not to sue Aylett, on which agreement Aylett might recover damages equivalent to those he had sustained by the suit.

I do not think this is shown. Aylett is no party to the endorsement, and it is only upon the intention that Campbell can be considered as coming under any stipulation to him. What, then, was his intention? Certainly not to discharge the obligation. The endorsement supposes the obligation to remain in full force, and is received in the confidence that it does remain in force. It may well be doubted, whether a destruction of the obligation would not also destroy the endorsement; for Page agrees only to stand in the place of Aylett in the obligation, and if that be annulled, it is by no means clear that Page is bound to any thing. Were this even otherwise, it is very certain that Page would be placed in a situation entirely different from what he intended. If the endorsement is to be considered as a substantive agreement, referring to the obligation, for the sole purpose of ascertaining the sum for which he was bound, and remaining in force after the destruction of that obligation, then Page would be liable to Campbell for the whole debt, without retaining that recourse against Brooke for a moiety of it, which Aylett certainly possessed. He would not then stand in the room of Colonel Aylett, as the endorsement imports, but in the room of both Aylett and Brooke, which the endorsement does not import. To construe Campbell's assent to this endorsement, then, as an agreement not to sue Aylett, if the effect of that agreement would be to destroy the obligation, would be to defeat the plain intention of the parties, and effect an object they designed to guard against. This is not to be tolerated, if the act can be otherwise construed. I can perceive no difficulty in doing so. The intention of the endorsement being, to secure Colonel Aylett against the claim of William Campbell, and to transfer his liability to Mr. Page, leaving Mr. Brooke still bound, the endorsement must be so construed as to give full effect to the whole of this intention, so far as its words will justify. Now, if by supposing an agreement on the part of Camp-

bell not to sue Aylett, we plainly defeat the intention of the parties, and probably annul the instrument itself, we ought not to suppose such an agreement, but some other more congenial to their views. Their object would be effected by joining Aylett in the suit on the obligation, and either not proceeding to judgment against him, or not using the judgment when obtained. If it were true, that the suit could never be brought against Brooke without joining Aylett in the writ, it would be much more rational to suppose that an agreement for his security, omitting to describe the mode by which it was to be effected, was to be carried into execution by means consistent with other objects plainly intended by the parties, than by means which must defeat those objects.

The respect which the law in all such cases pays to the intention with which an instrument is executed, may receive some illustration from the difference between the construction of a perpetual and of a temporary covenant, not to put a bond in suit; precisely the same words which, in a perpetual covenant, is a bar to an action, cannot, if used in a temporary covenant, be pleaded to an action brought during the suspension. Why is this? If the perpetual covenant can bar the action forever, why may not the temporary covenant be pleaded to an action brought while the suspension exists? The reason of the distinction is found in the principle, that a personal action once suspended, is gone forever; although, therefore, it is the intention of the parties to suspend the action, and although this intention is expressed by their words, yet, as the consequence of giving effect to this intention would be to destroy another more important object, the validity of an instrument not designed to be destroyed, such a covenant is not allowed to constitute even a temporary bar, but the party injured by its breach, must take his remedy by a cross action upon it.

On general principles, then, I should, in the absence of express authority, be led to the conclusion that a covenant with one of several joint obligors not to sue him, could not be pleaded as a release; but the very case has, I think, been decided.

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In *Hutton v. Eyre*, 1 Marshall, 609; 6 Taunt. 280,(2) which was cited by Mr. Call, the action was brought for money paid to the use of the defendant. The plaintiff and defendant being partners, entered into a deed on the 26th of August, 1809, to dissolve their partnership on the 1st of January, 1810, and agreed that neither would in the mean time contract any debt on the credit of the firm. On the 27th of October, 1810, the defendant executed an assignment of all his property to trustees, for the benefit of his creditors, in consideration of which the creditors covenanted and agreed with the defendant not to sue him on account of any debt due to them from him; and that in case they did sue him, the deed of assignment should be a sufficient release and discharge for him. The trustees sold the property assigned to them, and paid five shillings in the pound to the creditors, after which the plaintiff paid the residue of certain debts contracted by the defendant between the date of the agreement and the time of dissolution, on the credit of the firm, for which this suit was brought. It was contended for the defendant that the covenant not to sue him being perpetual, was a release not only to him, but to his partner also, and that the payment being voluntary, gave no cause of action.

It is observable that this case is stronger than that under consideration would be, did the endorsement made by Page, on the bond of Aylett and Brooke, even contain a stipulation that no suit should be brought against Aylett, because the instrument provides expressly, that in case suit should be brought, the deed of assignment should be a sufficient release and discharge.

In delivering the opinion of the court, Lord Chief Justice Gibbs noticed the cases of *Lacy v. Kynaston*, and *Dean v. Newhall*; but observing the circumstance that those cases were on joint and several obligations, and were, therefore, not direct authority for the case before the court, he added: "We must look at the principle on which the rule has been applied, that a covenant not to sue shall operate as a release. Now, where there

(2) 1 Eng. Com. Law Rep. 385.—[Editor.]

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is only A. on one side, and B. on the other, the intention of the covenant by A. not to sue B., must be taken to mean a release to B., who is accordingly absolutely discharged from the debt which A. undertakes never to put in suit against him. The application, therefore, of the principle in that case, not only acts in prevention of the circuity of action, but falls in with the clear intention of the parties; but, in a case like the present, it is impossible to contend that, by a covenant not to sue the defendant, it was the intention of the covenantors to release the plaintiff who was able to pay what his partner might be deficient in. It would have been an easier and a shorter method to have given a release than to make this covenant. The only reason, therefore, for their adopting this course, *was*, that they did not choose to execute a release to the defendant, because that would also have operated as a release to the plaintiff, whereas they considered that a bare covenant not to sue the defendant, would not extend to his partner; as, therefore, the terms of the covenant do not require such a construction, and as such construction would be manifestly against the intention of the parties, we are decidedly of opinion that it ought not to be permitted so to operate."

I can add nothing to the language of Chief Justice Gibbs, to show farther the direct application of this case to that under the consideration of the Court. That this was not a joint obligation, but a joint *assumpsit*, constitutes, I think, no difference in the cases.

In considering a principle of construction, which rests entirely on a technical and positive rule, as defeating a plain intention, it may not be altogether improper to consider the action of other technical principles on the case.

It is clear, that if this endorsement be construed as an agreement between Campbell and Page, who is a stranger to the bond, it cannot release Brooke the obligor. This is expressly stated by the court in the case of *Lacy v. Kynaston*; but if it be considered as an agreement between Campbell and Aylett, still it is an agreement by *parol* only, and an agreement by *parol* cannot release an instrument of writing under seal. This



subject is discussed in 2 Saunders, 47,(3) in a note of Mr. Williams. Brooke does not allege satisfaction of the contract, but a discharge from it; he does not allege performance, but that he is not bound to perform. The instrument which will sustain such a defence, must be of equal dignity with that which it professes to dissolve.

According to the best view I can take of the question, I cannot consider the endorsement made by Page on the bond of Aylett and Brooke, as implying any agreement on the part of Campbell, which could be used by Brooke, in law or equity, as a release.

The next objection to Campbell's claim is, that the estate of Robert Page, ought to be exhausted, before recourse is had to Brooke; because, in June, 1792, Braxton mortgaged sundry slaves to Page and White, to indemnify Page, on account of this suretyship, and White, for suretyships entered into by him. Braxton was afterwards taken in execution at the suit of Richard Adams, upon which Page and White agreed that a sufficient portion of the mortgaged property, should be sold to discharge the execution. It is contended on the part of Brooke, that he has an equal interest with Page in this mortgage, that it was the duty of Page to see to its application to the discharge of the debt, for which they were both bound, and that he is liable, *first*, for his negligence in allowing the property to be wasted; and *secondly*, for having allowed a part of it to be applied to a different object.

As Campbell was not party or privy to this transaction, it can give Brooke no claim on Campbell, were it even admitted to give him an equity against Page. It is undoubtedly the course of the Court, to decree in the first instance against the party who is ultimately responsible; but this is only done, where the parties are before the court at the time of the decree, and their several liabilities, are clearly ascertained. It would be alike unprecedented and unreasonable, to anticipate, in this action,

(1) *Fowell v. Forrest*, 2 Saund. R. 47, n., and Mr. Williams's note(1).—[*Editor*.]

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the liability of Page to Brooke, for a transaction not before the Court, and to compel Campbell to resort to that liability, and to forego his direct claim on his immediate debtor, and that without any proof of the competency of Page's estate, to satisfy the unascertained equity of Brooke. The unreasonableness of such a pretension seems so obvious, that I presume it is brought forward only on account of its connexion with a subsequent transaction between Page and Campbell.

On the 6th of June, 1821, articles of agreement were entered into between the representatives of Page, and the attorney in fact, of Campbell, in which Campbell agrees in consideration of one moiety of the whole debt paid by Page's representatives, not to proceed against them for satisfaction of any part of the decree which might be obtained against the representatives of Page and Brooke; but this agreement is to be without prejudice to his right to pursue the other defendants till the other moiety of the debt should be satisfied: "and the said Campbell farther covenants, that the representatives of Page, shall never be made to contribute anything to the estate of George Brooke, on account of any payment the said Brooke's estate may be decreed to make to the said Campbell."

This agreement, not to levy the decree, which might be obtained against the representatives of Brooke and Page, upon the estate of Page, which had already paid one moiety of the whole debt, is in terms, which exclude the idea of being technically a release of the action, for that is to proceed, as if the agreement had not been made. The representatives of Brooke, can avail themselves of it so far only, as it raises an equity in their favour, against Campbell. What is this equity? It cannot be contended, that receiving one moiety of the debt from Page, is an injury to Brooke; *ex parte*, Gifford, 6 Ves. Jr., 805; nor can he be injured by the agreement not to levy Brooke's moiety, in any possible state of things, on Page. The liability of Brooke cannot be increased, nor his burden augmented by this transaction. It may be diminished, because his possible liability for more than a moiety of the debt, is removed. Can the covenant, that the

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representatives of Page shall never be made to contribute anything to the estate of George Brooke, on account of any payment the said Brooke's estate may be decreed to make to the said Campbell, give Brooke an equity against Campbell?

To sustain this, it will be necessary to prove, that the estate of Brooke has an equity against that of Page, and that it is deprived of that equity by this agreement. The amount of this injury is, the precise extent of Brooke's claim on Campbell.

Brooke's equity against Page, is founded on the agreement that a part of the property mortgaged to White and Page, might be applied in payment of the debt due from Braxton to Adams, and on the failure of Page to apply the mortgaged property to Campbell's debt.

This mortgage was obtained for the benefit of Page and White, in proportion to their respective responsibilities, and it will not, I presume, be denied, that they are to be completely exonerated, before any equitable claim on the fund can accrue to Brooke. How far Mr. White may have been relieved does not appear, nor is it shown that one cent arising from this property has ever been applied to the use of Mr. Page. Admitting him to be responsible for the sum paid to Adams, his responsibility can be only for the excess of that sum over the debts the mortgage was intended to secure, and Brooke ought to show that excess. Its existence is not and cannot be pretended.

As little foundation is there for the claim growing out of the alleged negligence of Page.

It will scarcely be pretended, that one of two sureties who obtains an indemnity for himself, becomes thereby responsible to the other for that other's moiety of the debt, however insufficient the thing given as an indemnity may be, even to secure himself. If this cannot be pretended, it will certainly be required from the person who claims the residue, to show that there was a residue, and that it has been lost to him by the fault of the party whose responsibility he alleges. His difficulties would not, even then, be overcome. The inquiry would still be, why did he not himself proceed to assert his equity, by call-

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ing on the mortgagee and mortgagor to apply the fund to its proper object, and thereby relieve him to the extent of his right. But I enter not into this inquiry, because the subject is not, and probably never will be, before the Court. It is enough to say, that this equity cannot be assumed in this suit to the discharge of Brooke's debt to Campbell.

I will barely add, to prevent my being understood as deciding anything which might affect a point, not strictly before the Court, that I do not mean to indicate any opinion whether the contract between Campbell and Page could or could not influence any claim of Brooke on Page, growing out of the conduct of Page respecting the mortgage of 1792. In deciding on the right of the plaintiff to demand a specific performance of his contract with Macon, that question must be considered as remaining open.

An additional objection to Campbell's claim on the Mantapike estate, is derived from the length of time which has elapsed since the decree by which his debt was established.

The decree of affirmance was entered on the 3d of March, 1800, in the court of chancery; and on the 29th of September, in the same year, all attempts to find the mortgaged property having failed, executions were directed by the court to issue against the estate of Brooke and Page respectively, in the hands of their respective representatives, who, on the 18th of March, 1801, were ordered to settle their several accounts of administration before a commissioner of the court. From that time till the 27th of October, 1820, when the supplemental bill was filed, no step whatever has been taken against Brooke's estate. By this gross negligence, the plaintiff alleges, that his testator has been greatly injured, if Campbell be now permitted to charge his debt upon Mantapike.

There is undoubtedly great weight in this objection; but the extent of its influence on Campbell's claim, depends on circumstances, the testimony concerning which, is not to be found in the record before the Court. It will form a very material part of the case, in which Keith is plaintiff. That case being not ripe for a hearing, the claim of Campbell upon Mantapike, even

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while it remained in the hands of the devisee, must, for the present, be considered as uncertain. Previous to any discussion of the effect of such a claim on this contract, the court will proceed to the *second* point made by the *plaintiff* in the argument, which is, that

*Second.* If Campbell's is one of George Brooke's just debts, and is chargeable on his lands, still it cannot charge Mantapike, in the hands of William H. Macon.

In considering this point, I shall assume for the present two propositions:

1. Had Keith's suit, praying a sale of Mantapike for Campbell's debt been instituted before the contract between Garnett and Macon was entered into, the subsequent sale, made by the executor, without the assent of the court or creditor, could not have relieved the land from the charge created by George Brooke's will.

2. Had the conveyance been made, and the purchase-money been paid, before notice of the claim, the purchaser would not have been affected by it.

It is unquestionably true that, whatever doubts may exist respecting the liability of a purchaser, for the application of the purchase-money, to schedule debts, with which lands are charged, he is exempt from all liability for its application to debts generally. Had the contract, then, been fully executed before this claim was asserted, Mantapike would have been clearly exonerated from it.

These propositions are stated, for the purpose of clearing the way, to the very case before the Court; the case of a contract for the purchase of land, equitably charged with the payment of debts, and notice of a debt given to the purchaser between the date of the contract, and the time when it is to be executed.

In considering this case, the question immediately occurs, whether there is any distinction between a charge on lands, which descend to the heir, or pass to a devisee, subject to the charge; and a devise to executors or other trustees, for the payment of debts.

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In *Moseley* 96, [anonymous,] and in *Nelson's Ch. Rep.* 36, this question was answered in the affirmative by the court; and it was determined, that where lands were charged with debts generally, they remained liable to creditors in the hands of a purchaser. This distinction was, however, overruled in the case of *Elliot v. Merryman*, *Barnardist. Ch. R.* 78, 81-82, in which the master of the rolls determined, that in such a case the purchaser was not liable for the application of the purchase-money, and said that, "otherwise, whenever lands are charged with the payment of debts generally, they could never be discharged without a suit in chancery, which would be extremely inconvenient."

There were many circumstances in the case of *Elliot v. Merryman*, showing, that the creditors acquiesced in the sales, and looked to the vendor for their money, which might have had great influence on the mind of the judge; and, if that case stood alone, the question might not be considered as settled. But it does not stand alone. The principle laid down by the master of the rolls, appears to have been followed ever since; and in *Walker v. Smalwood*, *Amb.* 676, which was a charge on land for debts generally, the chancellor said, "the court has established it as a rule, that where the charge is general, the purchaser is not bound to see to the application of the purchase-money." This rule has been pursued invariably in the English courts for near a century, and may, therefore, be considered as well settled. Although the charge creates no legal estate, it manifests a clear intent that the person in whose favour it is made, shall receive so much out of the land, which a court of equity considers as a trust, and converts the owner of the legal estate into a trustee. The heir or devisee, being once considered as a trustee, and the charge considered as a trust, public convenience and uniformity of decision would lead to an assimilation of these charges, or implied trusts, to those which are express; and, in general, where no other question arises than what relates to the construction of the trust, and the respective duties it imposes on a vendor and vendee, in a case attended with no peculiar

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circumstances, a court of equity perceives no ground of distinction between them. But, if it be admitted as a principle, that in a case of direct and culpable, or of negligent and constructive collusion between the vendor and vendee, by which the trust may be defeated, the purchaser may become responsible for the application of the purchase-money; or, in other words, the land may remain charged in his hands; it is possible that there may be a difference in the testimony required to establish this constructive collusion, in the one case, and in the other.

If lands be devised to trustees or executors, to be sold for the payment of debts, the devisee possesses a legal, but not a beneficial estate in the premises. He can sell for the purposes of the trust only, and the vendee can consider him as acting no otherwise than in the execution of a trust, for which he has been selected by the owner of the property. This confidence being placed in him by the person who had the sole right to dispose of the property at his will, no other can question the correctness of his proceeding, or can be justifiable in suspecting any intention to violate the trust. The payment of the purchase-money, therefore, to the trustee, is an act which is the regular consequence of the contract, and if that be made fairly, the purchaser has no right to inquire in what manner the residue of the trust will be executed. He has no right to suspect that the person who has been selected by the testator for its execution, will violate the trust reposed in him, and no collusion between him and the trustee ought to be implied from equivocal acts. The existence of a debt is the very circumstance which justifies a sale, and notice of its existence can never excuse the purchaser for withholding the payment of the purchase-money.

But where lands descend to the heir, or pass to the devisee, he does not necessarily sell, in execution of the trust, but for his own purposes. The trust is, in a great measure, the creature of a court of equity, and the heir, or devisee, is made a trustee by the court. When he sells, he is not executing a power confided to him for the purpose of paying debts, but is parting with

an interest vested in himself, for his own use, which interest is charged with debts. The purchaser does not consider the seller as executing a trust, nor does he so consider himself; but each considers him as acting for his own benefit. If, in such a case, the charge still remains unsatisfied, the purchaser who has notice of it, may be considered as aiding in, and conniving at, a violation of the trust, under circumstances which would not justify the same conclusion, if the trustee professed to act in the execution of his trust.

It becomes, therefore, material to inquire, what degree of connivance on the part of the purchaser, in acts which may defeat the trust, will leave him responsible to the creditor.

It is scarcely necessary to say, that positive fraud or direct collusion, for the purpose of defeating the trust, will charge the purchaser. It is unnecessary to urge this proposition, because the principle is, I believe, conceded by all, and because too, the transaction before the Court, has no taint of that description; its moral fairness is not questioned, and the sole inquiry is, whether the purchaser by proceeding with the contract and paying the purchase-money, would have exposed himself to the hazard of such a constructive collusion, as to leave him subject to the claim of the creditor.

In pursuing this inquiry, it is proper to recollect, that Mantapike was devised by George Brooke, to his son Richard, charged with the payment of his debts. This devise gave Richard an absolute estate at law, subject to an equity, which could be asserted only in a court of chancery. Richard Brooke would be considered, in this Court, as a trustee for the creditors of his father, and had they applied to a court of equity, a sale of the property would, if necessary, have been decreed. Richard survived his father upwards of thirty years, during which time no claim was asserted on Mantapike, and in his last will, devised his estate to be sold, and the money divided among his children. One clause is supposed to charge his real as well as personal estate with his debts.

Although a court of equity will consider the trust with which



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Mantapike was chargeable in the hands of Richard, as passing with his land to his devisee, yet the devisee might naturally consider himself as acting under the express trust contained in the will of his immediate testator. The purpose of his sale would be, to comply with the will of Richard, and any presumption, that he might possibly hold himself bound to pay the debts of George, is prevented, so far as respects Campbell's claim, by the fact, that he denied all liability for that claim. If the purchaser should, after receiving notice of that claim, proceed to pay the purchase-money to the seller, who contested its validity, and did not hold himself responsible for it, the question arises, whether payment under such circumstances might not be considered, in a court of equity, as so far implicating the purchaser in an act tending to defeat the trust, as to charge him in the event of a failure on the part of the trustee, with the amount of the debt, so far as the purchase-money was liable for it. With full notice of the claim, he pays the money to a person who receives it, not for the avowed purpose of applying it to the objects of the trust, but of applying it to distinct trusts created by the will of which he is executor.

This state of things presents a case entitled to very serious consideration.

It is an old rule, that all persons acquiring property bound by a trust with notice, shall be considered as trustees. The ancient cases on this point are collected in *Equity Cases Abridged*, under the title *Notice*, and the modern decisions maintain the principle; the purchaser is subject to all the consequences of notice, if he receives it before payment of the purchase-money. In one case, *Wigg v. Wigg*, 1 Atk. 382, 384, this rule has been carried so far as to affect the purchaser who had paid his purchase-money, but had not received his conveyance. Whatever may be thought of the rule as applying generally to cases of this description, it has, I believe, never been doubted, that notice after the contract and before the payment of the purchase-money, made the purchaser a trustee.

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That the charge created by the clause in George Brooke's will, which subjects his lands to the payment of his debts, is a trust in the view of a court of equity, is admitted, and the purchaser with notice must take the land clothed with that trust, unless he can bring himself within the principle that he is not bound to see to the application of the purchase-money.

I have certainly no disposition to contract this principle within narrower limits than have been heretofore assigned to it. On the contrary, I am strongly inclined to the opinion that, if the instrument by which the trust is created, contains no provision contradicting the presumption that the person who is to make the sale is also to execute the trust throughout, it will be found difficult to maintain the *dicta* which are scattered thick through the books, declaring the purchaser bound to see to the application of the purchase-money, in cases of scheduled debts, or legacies. The principle, however, which supports this opinion must be examined, to determine how far it will carry us. The person creating the trust has confided its execution to the trustee, where he has named one, and it is a part of his duty to sell the trust property, and generally to receive the purchase-money, and dispose of it for the purposes of the trust. The trust could not be executed without a sale, and sales would be very much embarrassed, if the purchaser, by the mere act of purchase, became a trustee. In all cases, therefore, where the objects are not so defined as to be brought at once to the view of the purchaser, it is settled, that he is not affected by them, and has only to pay the purchase-money. The same rule is established in the case of a charge, where the lands descend, or are devised, liable to the payment of debts. In such case, a court of equity considers the heir, or devisee, as a trustee, and exercises the same control over him as over a trustee named by a testator.

In either case, if there be nothing to show that the trustee is acting in violation of his trust, the purchaser must consider him as acting in pursuance of it; and as the sale may be a necessary part of it, the purchaser has done every thing incumbent on him

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when he pays the purchase-money, and is, consequently, relieved from the necessity of inquiring into the conduct of the trustee.

But trusts, whether express or implied, are the peculiar objects of care to courts of equity, and are guarded from abuse with great vigilance. In the exercise of this vigilance, they extend their control, not only over the trustees themselves, but over all those who have transactions with the trustees. Their endeavours to secure the faithful execution of trusts would often be defeated, if their regulations could not comprehend and bind those who contract for the trust property. To prevent the abuse of trust by the trustee, it is necessary to annul his acts, so far as they constitute an abuse; or in other words, to consider the property in the hands of a purchaser who has aided in the abuse, as still charged with the trust. In affirmance of this principle, the master of the rolls said, in a late case, *Balfour v. Welland*, 16 Ves. Jr., 156, "Where the act is a breach of duty in the trustee, it is very fit that those who deal with him should be affected by an act tending to defeat the trust, of which they have notice."

Plain as this principle is, and strictly conformable as it is to the general doctrines of a court of equity, there is some difficulty in applying it to particular cases. It is not easy to mark the precise act which constitutes such a breach of duty in the trustee as will affect the purchaser. If William Garnett be considered, in this court, as a trustee for the execution of George Brooke's will by the sale of Mantapike, it would defeat the trust to sell that estate for the uses described in Richard Brooke's will, unless the debts of George Brooke are to be considered as the debts of Richard Brooke, provided for by that clause in his will which respects his own debts:—And if William Garnett sold, with the avowed purpose of excluding the debts of George Brooke, or if he should proceed to distribute the money according to the will of Richard Brooke, disregarding the claims of George Brooke's creditors, if there be any, the trust, so far as respected those claims, would be defeated, and a purchaser

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intending to aid in thus defeating the trust, could not be perfectly secure. But if William Garnett sold, with the intention of paying George Brooke's creditors first, and then of distributing the residue of the money according to the will of Richard Brooke, the act of sale would be no breach of trust, since a sale would be necessary for its performance. A purchaser, therefore, of the Mantapike estate might be placed in some peril. After receiving notice from a creditor of George Brooke, he might be considered, if he proceeded with the contract, as taking upon himself a responsibility for the subsequent transactions of William Garnett, which was no part of his engagement, and which he did not mean to take.

I very readily admit, that if a trustee sells for the payment of debts generally, he is at liberty to contest any particular debt, and no notice to the purchaser can involve him in the contest. But, in such case, the trustee is in the fair execution of his trust, and regular performance of his duty; and the purchaser, having no right to intrude himself into the trust, cannot be made responsible for its execution. But if the trustee, not professing to sell under the trust, holds himself absolved from it, and this is made known to the purchaser, the question, whether by completing the purchase, he assists in defeating the trust, and will be held responsible in a court of equity, becomes a much more serious inquiry. In pursuing it, all the circumstances must be considered, in order to determine whether they prove satisfactorily that the trustee is not acting in pursuance of the trust, but under the opinion that it does not bind him.

In this case, William Garnett is the immediate trustee of Richard Brooke, charged with the execution of his will, which directs the sale of Mantapike for the benefit of his children, and probably for the payment of his own debts. Although a court of equity will consider the land as charged with any debt due from George Brooke, and treat the devisee of Richard Brooke as a trustee for such creditor, yet the devisee would assume a very great responsibility, were he to undertake to pay this debt without the direction of a court. If the existence of the debt

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might be presumed, of which great doubts have been suggested at the bar, the extent of his testator's liability for it is far from being certain. The personal estate of George Brooke ought to have been exhausted before his real estate became chargeable, and the proportion of the debt with which Mantapike ought, under all circumstances, to be charged, could not safely be settled by the executor. No counsel could have advised William Garnett to incur this responsibility. No court could censure him for not incurring it. William H. Macon, then, who purchased without suspicion that any creditor of George Brooke remained unsatisfied, had great reason for the apprehension that Mr. Garnett, not considering himself as a trustee for the benefit of such creditor, would apply the money to the uses prescribed in the will of Richard Brooke. This apprehension could not be removed by any inquiry. The bill filed by William Garnett to enforce a specific performance, alleges expressly that Campbell's debt was not due from George Brooke, and that if it was, Mantapike is not charged with it. Whether any direct communication took place between the parties on the subject is unknown; but as none is stated, none can be presumed. The fact, however, is sufficiently obvious, that any inquiry respecting it must have been answered by the assurance, that the justice of the claim was denied. Whether going on to complete the contract, by paying the purchase-money, under these circumstances, would be considered by a court of equity as such a concurrence in "an act tending to defeat the trust" as would effect the purchaser, is a question of real difficulty. Some light may be thrown upon it by analogies drawn from the liability of the purchaser of leasehold estates. It is well settled, that the purchaser of a chattel from an executor is not liable for the application of the purchase-money, although such chattel be given in trust for a special purpose, or be itself a specific legacy. *Elliot v. Merryman*, Barnardist. Ch. R. 78, 81; 2 Atk. 42; *Ewer v. Corbet*, 2 P. Wms. 148; *Burting v. Stonard*, 2 P. Wms. 150. The reason is, that no man can exempt his personal estate from the payment of his debts, or make any disposition of it which

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shall prevent its passing to his executors, to be sold by them if his debts require it. Consequently, whenever an executor sells in execution of his trust, the purchaser takes the property, freed from any charge with which the testator may have burdened it by his will. But if the sale be a breach of trust, and the purchaser have notice of the fact, he is affected by it. If the executor sells to a person who knows that there are no debts, or that all the debts are paid, and that the sale is not a fair execution of the trust, the purchaser may take the property subject to the trust. 2 P. Wms. 148, 150. So, too, if the executor sells at such under value as to indicate fraud, or for payment of his own debt. *Crane v. Drake et al.*, 2 Vern. 616; *Scott v. Tyler*, 2 Bro. C. C. 433, 477; *Andrew v. Wrigley*, 4 Bro. C. C. 125, 130; *Hill v. Simpson*, 7 Ves. 152, 167; *Lowther v. Ld. Lowther*, 13 Ves. 95; *M'Leod v. Drummond*, 17 Ves. 169.

These cases proceed upon the principle, that the executor does not sell in pursuance of his trust, but in violation of it, and that the purchaser, knowing this fact, aids him in its execution by making the contract. The purchaser is not bound to make any inquiry. The general power of the executor to sell, protects him in buying; but if he buys with notice that the sale is a breach of trust, the property remains charged with it.

I feel much difficulty in resisting the application of this principle to freehold estates charged with the payment of debts. It would seem to me as if the inquiry must always be into the fact. The question must always be—Is the sale, taking its object into view, a breach of trust? And are the circumstances such as to charge a purchaser, having express notice, with a participation in the breach? The purchaser of a chattel from an executor, with notice that no debts are due, or in payment of his own debt, seems to me to present the same question.

Two cases have been cited by the counsel for the plaintiff, as bearing very strongly on that under consideration of the Court. The first is, *Walker v. Smalwood*, Amb. 676; John Smalwood devised his estate to his son Thomas, charged with

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the payment of debts, and Thomas afterwards mortgaged the estate, and then devised it to his wife, charged with the payment of his debts. The bill was brought by bond creditors of John and Thomas Smalwood, against the wife and mortgagee. Pending the suit, they joined in selling the land to Yeomans, against whom a supplemental bill was filed, to set aside the sale; it was set aside upon the principle, that the execution of the trust had been taken out of the hands of the trustee, and transferred to the court. The chancellor said: "Though a general charge does not make a purchaser before the suit see to the application of the money, yet after a suit commenced, I should hold him bound to it; and I hold it as a general rule, that an alienation pending a suit is void." He also states, that actual notice was admitted.

The propositions stated by Lord Camden in this case, have not, I believe, been questioned, but those propositions do not reach the point now in controversy. A part of the purchase-money was applied to the mortgage made by Thomas Smalwood, and the case does not inform us, that any objection was made on this account; but the case does not inform us either, whether this mortgage was made in satisfaction of a private debt due from Thomas, or for money generally, which might have been applied to the debts of the father, or for a debt actually due by the father. Notice was admitted; but of what? Probably of the application of the money, and of the pendency of the suit; but these facts do not imply a breach of trust, since it is not shown that the mortgage itself, which is an alienation *pro tanto*, was made under circumstances which could involve the mortgagee in the application of the money. This case, then, has no positive application to that at bar.

The other case is, *Hardwick v. Mynd*, 1 Anstr. 109. William Mynd devised considerable estates to his son William Mynd, charged with certain legacies to his daughters. He also devised other estates to George Mynd and John Roberts, in trust for payment of debts, and appointed them his executors. George Mynd and John Roberts renounced the executorship,

and conveyed their interest in the freehold estates to William the son, subject to the trusts of the will. William mortgaged great part of the estate for his own debts, and, about eleven years after the death of his father, became a bankrupt.

The creditors of the father then filed this bill for the satisfaction of their demands, and it was admitted, that the most considerable of the mortgagees took, with notice of the situation of the property.

Eyre, chief baron, said: (and it is to be presumed the court concurred with him)—“If the trustees had made these mortgages, they would not have been disturbed; in fact they are made by them, for they have assigned their whole interest to William Mynd, to act for them in the trust.”

If the case stopped with this opinion, it would be, perhaps, conclusive, certainly very strong in favour of the plaintiff. The mortgagees took with notice of the misapplication of the purchase-money, and were yet not held responsible for that misapplication. This decision would certainly go far in showing that a purchaser, knowing that the sale was made, not for the purpose of the trust, but of the trustee, would yet hold the land discharged from the trust; but other points were determined which deduct considerably from the application of this opinion to the case at bar, if they do not entirely destroy it. The court held the trustees liable to make good the whole deficiency arising from the misapplication of the fund.

This case, then, considering the two points which were decided in connexion with each other, amounts to nothing more than this: where there has been a collusion between the trustee and purchaser, which results in an abuse of the trust, the trustee shall be chargeable in the first instance; but the case does not decide on the ultimate responsibility of the purchaser, should the trustee prove insolvent. Applying it to the case at bar, it would prove, that had William H. Macon proceeded, after notice, to complete the contract and to pay the purchase-money, and a suit been brought by the creditors of George Brooke, William Garnett would have been liable in the first instance;



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but does not, I think, prove that William H. Macon would not have been liable in the event of the trustee's insolvency. The court professed to found its opinion on the case of *Burt v. Den-net*, 2 Bro. C. C. 225.

Dennet was trustee in a mortgage-deed from Godfrey to Burtenshaw, by which an annuity of £30 per annum was secured to the plaintiff. Dennet, having transactions with Burtenshaw, assigned the mortgage to him without the privity of the plaintiff, and afterwards assigned his property to trustees for payment of his debts. Burtenshaw paid the annuity to the year 1784, after which he stopped the payments, upon which the plaintiff filed her bill against Dennet. The chancellor said: "The plaintiff ought to have made Burtenshaw and the assignees of Dennet's estate parties, by which she might have gotten the mortgage-deeds; he then should have decreed Burtenshaw to have paid the annuity, and Dennet to stand as a security for having broken the trust."

This case is not supposed to be applicable to that at bar, for the assignee of the mortgage was undoubtedly responsible for the annuity. It is cited solely because it was referred to by the court, as an authority for the opinion given in *Hardwick v. Mynd*, and may, therefore, tend to explain that opinion. It would countenance the idea, that in the case in which it was cited, the court did not suppose that the liability of the original trustee discharged the assignee.

Taking together the two parts of the opinion given in *Hardwick v. Mynd*, I cannot consider them as showing what would have been the decision of the court with respect to the mortgagees, had the trustees been insolvent. The report is very unsatisfactory, inasmuch as it assigns no reason for the decision, nor does it give the principle on which it stands. If the bill was dismissed as to the mortgagees, because the receipts of the trustees or of their agent, even under the circumstances of the case, amounted to an absolute discharge, it would be an express authority for the plaintiff in the case at bar. If the bill was dismissed, because the trustees were liable in consequence of their

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breach of trust, and were able to make up all deficiencies, it does not affect this case. If the court meant to say, that if the trustees had made these mortgages to secure a debt due from themselves, the mortgagees would yet have held the property discharged from the trust, the decision would appear to me to be in direct opposition to the principle settled in the sales of chattels by an executor, and to the general principle, that where the act is a breach of duty in the trustee, those who deal with him, knowing the fact, are affected by it. To mortgage the property to secure their own debt, would seem to me to be a direct and palpable breach of duty in the trustees, in which the mortgagee must have fully participated; and I cannot conceive that the court meant to say that such a transaction could be innocent. I must therefore suppose, that the decision turned upon the fact, that the trustee himself, who was before the court, was, of himself, unquestionably competent to pay the money, and ought to pay it. It is true, that if the court proceeded on this idea, the land ought to have been held still responsible; but the report is too defective and unsatisfactory to warrant any confidence in its being full as to this point.

These cases, then, though they have a strong apparent bearing on that under consideration, are too loosely and too carelessly reported, to satisfy the Court that they were decided on principles which they are cited to support. I cannot consider them as proving that land sold for other objects, in exclusion of a debt charged upon it, is relieved by the sale from that charge, if the purchaser pays with notice of the intended misapplication of the purchase-money. I repeat, then, that it is a question of fact. Did the circumstances, under which Mantapike was sold, prove that the purchase-money was to be diverted from the payment of George Brooke's debts to other objects, with such reasonable certainty as to leave it probable, that a purchaser with notice would be liable for the application of the purchase-money? or, in other words, that the land would, in the event of misapplication and the insolvency of the trustee, remain charged in his hands?

These circumstances have already been stated. The most prominent are, that William Garnett was the immediate trustee under Richard Brooke's will, though considered in a court of equity as being also a trustee for George Brooke's creditors, whose claim was prior to that of Richard Brooke's creditors or legatees, but whose claim the vendor not only did not, but could not, safely mean to satisfy, unless directed by a court of equity so to do. The purchaser had certainly reason to believe, that the sale was not made with a view to satisfy the charge created by George Brooke's will, and that the purchase-money, if paid before the institution of a suit by Campbell's representative, would be applied to the purposes of Richard Brooke's will. If a suit should be instituted before the purchase-money became due under the contract, or before it was paid, the whole affair would then be transferred to the court of chancery, and he would no longer be master of his own conduct. In the one event, he would take upon himself the hazard of paying, with full notice of the charge, money which he had reason to believe was to be diverted to different objects; in the other, he would be involved in a chancery suit, the course and duration of which he could not anticipate. Do these difficulties constitute a valid objection to a decree for a specific performance?

It cannot be doubted that these difficulties, if presented to the mind of a prudent man, contemplating the purchase of an estate, and desirous of performing his contract according to its terms, might have a serious influence on his conduct, and might deter him from making the purchase. If informed of them, after making the contract, but before its execution by the paying of the purchase-money and receiving a conveyance, he would have such strong motives for stopping entirely, or at least for pausing until the impediments could be removed, as would, I think, justify him for so doing, in the opinion of any reasonable man. Had this suit come to a hearing as between the vendor and vendee only, on the day on which it was instituted, could a court of equity have pronounced the objections to the title so frivolous, as to decree that Macon should take it,

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without having those objections removed? Is the exoneration of the land from Campbell's debt, by a sale to a purchaser, with notice of all the circumstances which had come to the knowledge of Colonel Macon, so perfectly clear, that a court of equity ought to decree him to take the land and pay the purchase-money, without any security against the future demand of Campbell's representative?

Both on principle and authority, I think it very clear, that a specific performance will not be decreed on the application of the vendor, unless his ability to make such a title as he has agreed to make be unquestionable. *Marlow v. Smith*, 2 P. Wms. 201; *Rose v. Calland*, 5 Ves. Jr., 186, 189; *Roake v. Kidd*, 5 Ves. Jr., 647; *Stapylton v. Scott*, 16 Ves. Jr., 272; *Sloper v. Fish*, 2 Ves. & Beame, 149. And it is equally clear that a purchaser under such a contract as that between Garnett and Macon, had a right to expect that an unincumbered estate in fee simple would be conveyed to him. *Omerod v. Hardman*, 5 Ves. Jr., 722, 734; *Flureau v. Thornhill*, 2 Wm. Bl. Rep. 1078. In a contract for the purchase of a fee simple estate, if no incumbrance be communicated to the purchaser, or be known to him to exist, he must suppose himself to purchase an unincumbered estate, and a court of equity will not interpose its extraordinary power of compelling a specific execution of the contract, unless the person demanding it can himself do all that it is incumbent on him to do. It has been said at the bar, that the declarations of the chancellor to this effect, have been made in cases where the title itself was doubtful, not where there was a money charge upon the estate which would not materially affect the purchaser, and which might be paid off by him without any material change in his contract, and without inconvenience.

This allegation is not, I think, entirely correct. The objection is not entirely confined to cases of doubtful title. It applies to incumbrances of every description, which may, in any manner, embarrass the purchaser in the full and quiet enjoyment of his purchase. In 5 Ves. Jr. 189, *Rose v. Calland*, the property

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was stated to be free of hay tithe, and there was much reason to believe that the statement was correct. But the point being doubtful, the bill of the vendor, praying a specific performance, was dismissed. There is certainly a difference between a defined and admitted charge, to which the purchase-money may, by consent, be applied when it becomes due, and a contested charge, which will involve the purchaser in an intricate and tedious lawsuit of uncertain duration. There can, I think, be no doubt that Campbell's claim, controverted as it necessarily was by Brooke's representative, is of this character, and that the continuance of the charge on the land in the hands of a purchaser, with full notice of that claim, and of all the circumstances under which the sale was made, was too questionable to be disregarded as entirely frivolous, if alleged in a suit between Garnett and Macon only, for a specific performance. If it could not be entirely disregarded by a court, Macon was certainly justifiable in refusing to proceed while this cloud hung over the estate. He was certainly justifiable in referring the case to a court. He was justifiable in refusing to take the title which could have been made in January, 1819.

But although it was not in the power of Garnett to make a perfectly secure title, previous to a decree which would dispose of Campbell's lien, it is undoubtedly now in his power. All the parties are now before this Court, and if a specific performance should be decreed, the title which can be made to Macon will undoubtedly stand clear of Campbell's lien. The question, therefore, is, whether the contract ought *now* to be enforced?

It has been repeatedly declared, both in the courts of England and of this country, that time is not of the essence of a contract; and that a specific performance ought to be decreed, if a good title can be made at the time of the decree.

This principle is sustained by many decisions, and by the practice of the court of chancery in England, to refer it to a master, to report whether the title be good at the time. But I do not think that the English court of chancery has ever laid

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down the broad principle, that time was never important, and that an ability to make a clear title at the time of the decree, arrested all inquiry into the previous state of things. On the contrary, if a person sell an estate to which he has no title, he cannot, though he should afterwards acquire it, enforce the contract. There is an implied averment in every sale made without explanation, that the vendor is able to do what he contracts to do. If he is not, and the vendee sustains an injury in consequence of this inability, it would seem unreasonable that the contract should be enforced; it would be the more unreasonable, if the amount of the injury should not be the subject of exact calculation. It is a general rule, that he who asks the aid of a court of equity must take care that his own conduct has been exactly correct. It would be strange if this general rule should be totally inapplicable to time, in the execution of a contract. If the day be carelessly or accidentally passed over without making a conveyance, and no serious inconvenience result from the omission, the objection would be captious, and would very properly be discountenanced; but if the vendor was unable to clear up the title, until such an alteration had taken place in the state of things, as materially to affect the parties, time, I think, cannot, in reason, be deemed unimportant. It is settled that mere inadequacy of price is not a sufficient ground for a court of equity to refuse its assistance, unless the difference between the sum to be given and the value of the land, be so enormous, as to countenance the idea of fraud or imposition. Yet, if an unreasonable contract be not performed according to its letter, equity will not interfere. *Sugd. on Vend. & Pur.* 190, 2d Am. Ed. Between a contract which is unreasonable when made, and one which has become so before it can be executed, if the application be made by the person in fault, for the aid of the court against the party who has suffered by his inability, no clear distinction is perceived.

In the case of *Gibson v. Patterson et al.*, 1 Atk. 12, Lord Hardwicke, is reported to have paid no regard to the negligence of the vendor in producing his title-deeds. But this case is said,

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by subsequent judges who have inspected the record, to be misreported; and if it were not, it does not appear that there was any incumbrance on the estate, or that the condition of the parties had been affected by the delay.

In *Morgan v. Shaw*, 2 Meriv. 140, the chancellor said: "The inclination of my opinion is against the old doctrine, that time is in no case of the essence of the contract;" and in *Fordyce v. Ford*, 4 Bro. C. C. 498, the Master of the Rolls said: "I hope it will not be gathered from hence that a man is to enter into a contract, and think that he is to have his own time to make out his title." In *Harrington v. Wheeler*, 4 Ves. Jr., 686; and *Lloyd et al. v. Collett*, 4 Bro. C. C. 469, time was held material.

I think that the present doctrine of the court of chancery of England, is clearly in favour of the opinion, that where time is really material to the parties, the right to a specific performance may depend upon it; and I think that the same doctrine prevails in the courts of the United States. *Hepburn and Dundas v. Colin Auld*, 5 Cranch, 262, was a suit for a specific performance, which was objected to by the vendee, because six thousand acres of land, sold by Hepburn and Dundas, was not held by a title in severalty, but was an undivided interest in a much larger tract, and that the time of executing the contract was, in that case material. On that point the court says, p. 276: "It is not to be denied that circumstances may render the time material; and the court does not decide that this case is not of that description. But the majority of the court is of opinion, that the estate is to be considered as an estate held in severalty." It was also said, in *Pratt et al. v. Law and Campbell*, 9 Cranch, 456, 494, that time is made material to the specific performance of a contract, whenever, from the change of circumstances, a specific performance, such as would answer the ends of justice between the parties, has become impossible.

In *Brashier v. Gratz et al.* 6 Wheat. 528, the case was this:—Michael Gratz, residing in Philadelphia, sold, in March, 1807, to Walter Brashier, residing in Kentucky, a tract of land lying in Kentucky, which Gratz had purchased, and for the title to

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which, a suit was then depending. Brashier gave his notes for the purchase-money, and agreed to attend to the prosecution of the suit, for which service an allowance was made him in the price of the land. The land was sold at twenty-two dollars fifty cents by the acre, and it was agreed that if any part of the land should be lost by the decision of the court, Gratz should repay eleven dollars twenty-five cents for each acre that might be so lost.

The suits were not pressed to a decision, and in 1811, the fees were demanded from Gratz and were paid by him. In 1811, Brashier came to Philadelphia, and his notes being protested for non-payment, Gratz required that they should be paid, or that the contract should be rescinded. Brashier was unwilling to do either, and the question, whether Gratz was still bound by it, was left to arbiters, who decided that he was. Brashier became insolvent, and Gratz took the management of the suits into his own hands, which were decided in his favour in 1813. About this time the lands rose suddenly in value, on which Brashier tendered payment of his notes, and demanded a conveyance of the land. Gratz refused, and the bill was brought for a specific performance. It was dismissed in the circuit court, and the plaintiff appealed to the supreme court, where the decree was affirmed.

It will be readily admitted, that the case of Brashier and Gratz was a strong one against the plaintiff, much stronger than that now before this Court; but the principles laid down in its decision, apply to all cases where the party demanding the aid of the court, has failed to perform his part of the contract, and a change in circumstances, unfavourable to the party resisting the demand has taken place. The court says [pp. 533, 534]: "The rule, that time is not of the essence of a contract, has certainly been recognised in courts of equity; and there can be no doubt that a failure on the part of a purchaser or vendor, to perform his contract on the stipulated day, does not, of itself deprive him of his right to demand a specific performance at a subsequent day, when he shall be able to comply with his part



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of the engagement. It may be in the power of the court to direct compensation for the breach of contract in point of time, and, in such case, the object of the parties is effectuated by carrying it into execution; but the rule is not universal. Circumstances may be so changed, that the object of the party can be no longer accomplished; that he who is injured by the failure of the other contracting party, cannot be placed in the situation in which he would have stood, had the contract been performed. Under such circumstances, it would be iniquitous to decree a specific performance, and a court of equity will leave the parties to their remedy at law."

"If, then, a bill for specific performance be brought by a party who is himself in fault, the court will consider all the circumstances of the case, and decree according to those circumstances."

In reviewing the circumstances of the case, the court says: (pp. 539, 540,) "Another circumstance which ought to have great weight, is the change in the value of land; it was purchased at twenty-two dollars fifty cents *per* acre. Mr. Brashier failed to comply, and was unable to comply with his engagements. More than five years after the last payment had become due, the land suddenly rises to the price of eighty dollars *per* acre; then he tenders the purchase-money, and demands a specific performance. Had the land fallen in value, he could not have paid the purchase-money. This total want of reciprocity, gives increased influence to the objections to a specific performance, which are furnished by this great alteration in the value of the article."

The change in the value of the article in the case which has been cited, between the time when the money ought to have been paid, and the time when the money was tendered, was certainly enormously great, much greater than can take place in ordinary times; but the principle does not depend entirely on the excessiveness of that change. The principle undoubtedly is, that a very great change in the value of the article consti-

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tutes a serious objection to a decree for a specific performance, when claimed by the party whose fault it is, that the contract has not been executed.

In the case under consideration, a considerable change has taken place in the value of the article, and that change has been produced by a general declension in the price of lands. It must, therefore, materially affect the arrangements to be made by the purchaser for a compliance with his contract; the same property which, if sold in time, would probably have enabled him to pay for Mantapike, would not, on any reasonable estimate, now enable him to do so. If, then, William Garnett was unable to convey a perfectly safe title in January, 1819, Mr. Macon has sustained an injury by the suspension of his proceedings, the amount of which admits of no certain calculation, and which is probably equivalent to the difference in the value of Mantapike at that time and at this.

Although I am entirely satisfied that there is no moral taint in this transaction, that the omission to give notice of Campbell's debt was not concealment, to which blame, in a moral point of view, can be attached; yet a court of equity considers the vendor as responsible for the title he sells, and as bound to inform himself of its defects. The purchaser, in making a contract, may be excused for relying on the assurance of the vendor, implied in the transaction itself, that he can perform his agreement.

As I think Campbell's claim was a cloud lowering over the title Garnett could convey to a purchaser with notice, which justified Macon in refusing to go on with the contract, which cloud cannot be dissipated but by the decree of a court of chancery, and as before such a decree was attainable, the value of the article has greatly changed, that circumstance creates a strong objection to a specific performance. At the same time, it must be perceived that the vendor, who has committed no moral wrong, and who is now able to perform his contract, will sustain all the loss arising from the depreciation of the property, which he might have sold to another, had not Macon

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*Garnett v. Macon et al.*

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purchased. I felt some hesitation between a decree dismissing the bill, and a decree for carrying the contract into execution, considering the vendor, who has retained possession of the property, as entitled to the profits, and the vendee, who was justifiable for not proceeding with his contract, as exempt from the payment of interest. But, on reflection, I have come to the opinion, that as there is no fault in the purchaser, and as there was some remissness in the seller in not communicating Campbell's claim, that the whole disadvantage ought to fall on the vendor, and that his bill ought to be dismissed.

The point which has weighed heaviest on my mind, and about which I have felt the greatest difficulty, concerning which I have indeed at different times inclined to different opinions, is whether the sale under the will of Richard Brooke is, under all the circumstances of the case, to be considered as such a breach of trust, as respects the creditors of George Brooke, as will involve a purchaser, having notice before the contract of sale is carried into execution, in the consequences. I am rather disposed to the opinion that it is such a breach of trust. At all events, I am satisfied that it wears such a serious aspect, as to justify a purchaser in refusing to proceed.

**DECREE.** Bill dismissed,—each party to bear his own costs.

## Circuit Court of the United States.

VIRGINIA, MAY TERM, 1825.(1)

BEFORE

HON. JOHN MARSHALL, Chief Justice of the United States.

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### BANK OF THE UNITED STATES V. WINSTON'S EXECUTORS ET AL.

The lien on lands created by a judgment is given by the statute, which authorizes an *elegit*, and the lien depends upon the right to sue out an *elegit*.

Where money is paid by a surety for his principal, the surety is subrogated to all the rights of the creditor whose debt he has discharged. But *quære*—Is this ever done in favour of a person not bound by the original security, who discharges it as a volunteer?

The lien of a judgment on which execution is stayed, dates, not from the rendition of the judgment, but from the time when execution may be sued out. *Scriba, &c. v. Deanes, ante*, Vol. I. p. 170.

MARSHALL, C. J.—This is an application on the part of Pleasant Winston, to be allowed the sum he has paid the Commonwealth as surety for George Winston, on a judgment obtained by the Commonwealth.

(1) The three following cases having been decided at May and Spring Terms, 1825, should have preceded the case of *Garnett, &c. v. Macon et al.*—[*Editor.*]

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*The Bank of the United States et al. v. Winston's Executors et al.*

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In the year 1818, the Commonwealth of Virginia obtained a judgment against George Winston, for the sum of \$17,999 24. No execution has ever issued on this judgment. Soon after its rendition, an act was passed directing that execution should be delayed, on George Winston's giving sufficient surety for the payment of the debt by instalments. In pursuance of this act, bonds for the whole amount were executed, with Pleasant Winston as surety. Before the first instalment became due, judgments were obtained by the Bank of the United States, and by several other creditors, against George Winston. He made a deed of his property for the payment of his debts, giving priority to the debt due to the State of Virginia, which has been set aside by a decree of this Court as fraudulent. It being understood that the Commonwealth asserted a lien on this property, under its original judgment, and also under the deed, and the Commonwealth having declined becoming a party to the suit in this Court, no sale was ordered, but the marshal was directed to receive the rents and profits, and to hold them subject to the order of the Court. Afterwards, in the year 1824, the Commonwealth instituted suit on the bonds given by Pleasant and George Winston, and obtained judgments, some of which have been paid by Pleasant Winston. He claims to stand in the place of the Commonwealth, and to be paid his debt before those creditors who obtained judgments in the intervening time between the original judgment of the state against George Winston and the subsequent judgments against George and Pleasant Winston. He contends that the lien created by the original judgment still continues; that by paying a subsequent judgment on a bond given in consideration of the first, he is to be considered as having paid so much in discharge of the first, and, consequently, to be entitled to a preference over the other creditors. This claim is resisted by the other creditors on various grounds, some of which will be considered.

As the lien created by a judgment is given by the statute which authorizes an *elegit*, it is settled in this country that the

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lien depends on the right to sue out an elegit. 2 Call, 125,(2); 4 H. and Munf. 57.(3) This is not controverted; but it is insisted by Pleasant Winston that the Commonwealth may now sue out an elegit, on the original judgment against George Winston, and that he is entitled to the priority which that right gives to the Commonwealth.

When this idea was first suggested, it occurred to me, and I stated to the bar, that the doctrine of subrogation or substitution was confined to sureties, and had never been applied to a mere volunteer. If an assignable instrument be transferred, its obligation at law and equity remains. If a security not assignable, be discharged by a surety whom it binds, equity keeps it in force in his favour, and puts such surety in the place of the original creditor. But I think there is no case in which this has been done in favour of a person not bound by the original security, who discharges it as a volunteer. I will not say that it may not be done, but if it may, equity will consider all the circumstances, and impose equitable terms. The decision of this point, is not, I think, essential to the cause.

Were it admitted that Pleasant Winston has a right to rank on the fund in the power of the Court, according to the original judgment in favour of the Commonwealth, the inquiry would be, whether that judgment is still a lien. The counsel for Pleasant Winston contend that it is:—1. Because the proceedings under that judgment, on the part of the Commonwealth, do not amount to a stay of execution; 2. If they do, the execution may now issue, and will relate to the date of the judgment.

(2) Eppes et al., Executors of Wayles, v. Randolph.—[Editor.]

(3) Nimmo's Executor v. The Commonwealth. And however long the judgment may have been out of date, there is no doubt that, *if susceptible of being revived at all*, the lien upon the land, yet in the hands of the debtor, would be revived *eodem statu*. Tucker (President), in Watts et al. v. Kinney and Wife, 3 Leigh, 293. And where there are two judgments, and a surety, bound by the eldest judgment, pays it off, although the lien of the judgment is gone *at law*, equity will substitute him in the place of the creditor whose debt he has paid, and give him the benefit of his lien. The equity of the surety is superior to that of the second incumbrancer. *Ib.*—[Editor.]

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I shall not unnecessarily decide the first question. That may hereafter arise in a case which will depend entirely on it. I do not think this does. The second has already been decided in this Court. In the case of *Scriba v. Deanes*, *ante*, Vol. I. page 170, this Court determined that the lien of a judgment on which execution is stayed, dates, not from the time of its rendition, but from the time when execution may be sued out. I have not changed this opinion. If, then, Pleasant Winston could claim the lien created by the original judgment, his lien would be postponed to that of other creditors whose judgments were obtained before the expiration of the time, during which execution was suspended, unless it should be decided that the Commonwealth could have sued out an *elegit*, notwithstanding the act of assembly under which the bonds were taken which bind Pleasant Winston. I have said that it is unnecessary to decide this point at present. My reason is this. I think it too clear for controversy, that the Commonwealth, and those who claim under her, must abandon or abide by her original judgment. Equity cannot give all the advantages of both. If she, or her substitute, claim under the *elegit*, the party so claiming must be content with what the *elegit* will give. If, waiving the *elegit*, the Commonwealth pursues her remedy on the bonds which she has taken, instead of her original judgment, and thereby obtains more than that judgment would yield, equity will not aid her in the attempt to come in under the original judgment also. Waiving every other objection to the claim of Pleasant Winston, this is insurmountable. The debt to the Commonwealth is augmented by having recourse to the bonds which have been given in satisfaction of the judgment, and the fund for other creditors is diminished to the same amount, if she still claims her priority. Equity will not, to effect such an object, tack that priority to the subsequent judgments which augment the debt. I think, then, if every other objection to the claim of Pleasant Winston could be removed, it must fail, unless he could comply with the condition a court of equity ought to impose, the reduction of the claim of the Commonwealth to the amount of its judgment.

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The following order was made in this cause: "This cause came on to be further heard on the papers formerly read, and was argued by counsel; on consideration whereof, the Court is of opinion that it can take no cognizance of the question: whether the Commonwealth of Virginia has a lien on the lands of George Winston in virtue of the judgment, alleged in the answer of Pleasant Winston to have been obtained by the Commonwealth against the said George, on the 19th of June, 1818, for \$19,999 24, in the general court of this Commonwealth, and that until that question be decided, no decree ought to be made for the sale of the lands comprised in the deed of trust from George Winston to Charles J. Macmurdo and James Winston, dated 21st of August, 1820: liberty is therefore granted to any of the parties to this cause, to proceed in the courts of this state, in such manner as may be deemed proper, to obtain the decision of that question from the competent tribunal, without prejudice to the claim of such party or parties in this cause; and all parties in this cause are enjoined from pleading the pendency of this suit, or from alleging the same in bar of such proceeding."

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STEGALL ET AL. V. STEGALL'S ADMINISTRATOR ET AL.

Before Hon. JOHN MARSHALL, Chief Justice of the United States.

Under the act of Assembly of Virginia, (1 Rev. Co. ch. 107, sec. 10,) which declares, that if a wife willingly leave her husband, and go away and continue with the adulterer, she shall forfeit her dower, &c.; that part of the provision which relates to her willingly leaving her husband, is satisfied by any separation which is voluntary on her part: and any separation is voluntary which is not



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brought about by the husband's act, or by some constraint on her person. Therefore, where the husband wished his wife to accompany him, and she refused, although her parents objected to her going, and she excused herself on that ground, and because of reports that he was married to another woman, the separation must be considered voluntary on her part.

The words "and go away and continue with the adulterer," are satisfied by an open state of adultery, whether the woman reside in the same house with the adulterer, or in another house: whether in her own, or a friend's house, or his; or whether with or without the ceremony of marriage; in either case, she forfeits dower.

The claim of the wife to a distributive share of her husband's personal estate, stands on a different ground; her right to it under the statute of distributions is absolute, and she does not forfeit it by her conduct, however unworthy; (1 Rev. Co. ch. 104, sec. 29); and the court of equity is bound to carry this statute into effect, though the conduct of the claimant in equity has been reprehensible.

The presumption of law is in favour of the legitimacy of a child born in wedlock; but this presumption may be rebutted by other testimony. It is true that a mere *probability* of non-access by the husband, is not sufficient to repel the presumption; but it is not necessary for the party objecting to the legitimacy, to prove that non-access was *impossible*. If the evidence places the non-access beyond *all reasonable doubt*, it is sufficient to repel the presumption of legitimacy.

If a man marries a woman in such an advanced state of pregnancy, that the situation of his wife must have been known to him, it must be considered as a recognition of the child, afterwards born, as his own; any conduct of the husband after the birth, indicating a belief that the child is his, is decisive. But where the marriage takes place where the pregnancy is probably unknown; where the acquaintance between the parties most probably commenced too late for the husband, according to the law of gestation, to be the father of the child afterwards born; where the common opinion of the neighbourhood assigns the child to another man; where the boy grows up, not in the house of the husband of the woman, nor looking on him as a father, nor being considered as a son, and the reputation of the woman is not good; these are all circumstances which go strongly to repel the presumption of legitimacy.

A court of equity should direct an issue to try the fact of legitimacy, where the circumstances above narrated are supported by the depositions in the cause.

The unsworn declarations of the mother, that her son, born six months after marriage, is the son of another man, are not admissible to prove his illegitimacy, and *a fortiori*, the declarations of that man are not admissible; if their evidence is proper, their depositions should have been taken.

The general report of the neighbourhood on the question of legitimacy, is not to be disregarded, but its weight depends on the circumstances of the case, on the remoteness of the time when the fact occurred, and the difficulty of producing any positive evidence respecting it.

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MARSHALL, C. J., on the 22d day of June, 1825, stated the case, and delivered his opinion in this cause as follows:

This suit is brought by Catharine Stegall, widow of John Potter Stegall, deceased, and by James Wright, and Martha his wife, and Jordan R. Sherwood, which said Martha and Jordan, are the children of the plaintiff, Catharine, and claim to be the children of the said John Potter Stegall, deceased, against Beverly Borum, administrator of the said John Potter Stegall, and John Jennett, and Elizabeth his wife, and William Smith, and Nancy his wife, and Elisha Hodge, which said Elizabeth and Nancy claim to be the children of the said John Potter Stegall, by a subsequent marriage, and which said Hodge is the purchaser of Nancy Smith's portion of the real estate.

The object of the suit on the part of Catharine Stegall is to recover her dower and distributive share of the personal estate of the said John Potter Stegall, and on the part of the other plaintiffs, to recover their just share of his lands and personal estate.

The bill states the intermarriage of the plaintiff, Catharine, with the said John Potter Stegall, and their intercourse with each other, which, though they did not live together, was continued for some years, during which the plaintiffs Jordan and Martha, who are his children, were born, and that this intercourse was continued until it was broken off by his marriage with Susannah Portwood, the mother of the other defendants; that he continued to reside with the said Susannah until his death, which happened in the year 1818 or 1819; that Elizabeth was born before marriage, and is, consequently, illegitimate, not having been recognised, or if recognised, still illegitimate.

The answers of the children of the second marriage, assert their legitimacy, and controvert the marriage of the plaintiff, Catharine, who, about the year 1800, intermarried with Henry Hill by whom she has several children. They also deny that

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the plaintiffs, Martha and Jordan, are the children of John Potter Stegall.

The answer of the administrator states, that he has, in obedience to a decree of the county court, delivered over the slaves to the persons who were supposed to be the distributees.

As the claims of the several parties in this suit stand on distinct principles of law and fact, they will be separately considered; and, first, that of the plaintiff Catharine, who claims her dower in the land, and her distributive share of the personal estate of the deceased.

The facts that the plaintiff, Catharine Stegall, was the lawful wife of John Potter Stegall; that she lived separate from him in adultery with another man, to whom she was probably married, are satisfactorily proved. Her counsel, however, insist, that separation from her husband and her subsequent connexion with another man, are to be justified by the circumstances of the case. Her husband, it is said, was supposed to be married to another woman, and her parents would not permit her to accompany him.

The words of the act of assembly are: "But if a wife willingly leave her husband, and go away and continue with her adulterer, she shall be barred forever of action to demand her dower, that she ought to have of her husband's lands, if she be convicted thereupon, except &c." 1 Rev. Code of 1819, ch. 107, sec. 10, p. 404.

So far as respects that part of the provision which relates to the wife's willingly leaving her husband, I think it is satisfied by any separation which is voluntary on her part; and I think any separation voluntary, which is not brought about by his act or by any restraint on her person. In this case, it does not appear that her person was restrained, and the authority of her parents ceased on her marriage. Her husband wished her to accompany him, and she refused. The separation must therefore be considered as voluntary on her part. The report that he was married with another woman does not justify her refusal to accompany him, because it was not true, in fact, and

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she ought not to have acted upon it. But if his real situation was such as to justify separation, it could not justify her subsequent conduct. That was incompatible with the continuance of her claims on him as a husband.

The words, "and go away and continue with her adulterer," would, I am much inclined to think, be satisfied by an open state of adultery, whether the woman resided in the same house with her adulterer, or in separate houses; whether in her own or a friend's house, or in his; whether with or without the ceremony of marriage, which, in this case, is absolutely void, and which, if performed in the belief that her marriage with Stegall was a nullity, may justify that act to her own conscience, but cannot justify her claim to dower in Stegall's estate. I think it perfectly clear that she is not entitled to dower in his lands.(1)

Her claim to a distributive share of his personal estate stands upon different ground. The act of assembly, 1 R. C. ch. 104, sec. 29, p. 382, gives a lawful wife an absolute right to a portion of her husband's personal estate, and she does not forfeit that right by her conduct, however unworthy it may be. This Court is, I think, as much bound by that act, as a court of common law would be. The principle, that a court of equity will not interfere in aid of a person whose conduct has been reprehensible in the particular case in which its aid is asked, applies, I think, to cases in which the party has a remedy at law; and

(1) Lord Coke, in his Commentaries upon the Statute of Westminster, 2 ch. 34, from which the section of our law quoted by the Chief Justice is taken, says: "If the wife elope from her husband, that is, if the wife leave her husband, and goeth away and tarrieth with her adulterer, she shall lose her dower until her husband willingly, without coercion ecclesiastical, be reconciled unto her, and permit her to cohabit with him, all of which is comprehended shortly in two hexameters:

'Sponte virum mulier fugiens et adultera facta,  
Dote sua careat nisi sponsi sponte retracta.'

And if she goeth with or to the avowtrer, this is a departure and a tarrying, albeit she remaineth not continually with the avowtrer, or if she tarrieth with him against her will, or if he turn her away, or if she cohabit with her husband by the censures of the church, in all these cases she loses her dowry." 1 Thomas's Co. Litt. 609, 610. See also 2 Co. Inst. 434.—[Editor.]

if ever applied to one in which no remedy at law exists, it must be a right which originates merely in equity, and may therefore be withheld or granted according to circumstances; but a right given by a statute cannot, I think, be denied by a court of chancery, if it can be asserted in no other court. In such a case, a court of chancery can exercise no more discretion than a court of common law.

The plaintiff, Catharine, is therefore entitled to her distributive share in John Potter Stegall's personal estate.

The next claim to be considered, is that of Jordan R. Sherwood, formerly Jordan R. Stegall, her eldest son, who was born six months after the marriage took effect.

Being born in wedlock, he is legitimate, unless the conclusion of law can be met by such testimony, as according to principles settled in adjudged cases, is sufficient to repel it.

There is no positive testimony showing the first acquaintance between the parties. Joseph Gill was well acquainted with Stegall, lived within three miles of Colonel Sherwood, the step-father of Catharine, the plaintiff, with whom she resided, and does not recollect seeing Stegall in the neighbourhood before his marriage.

Penelope Sherwood, her half-sister, was about three years old when the marriage took effect; and her recollection as to the length of time Stegall was at her father's house, cannot be accurate. Her present impressions, must depend more on the statements she has heard in the family, than on her positive memory. She would represent the first appearance of Stegall at the house, to have preceded the birth of Jordan about eight months.

Polly Pinny represents the first visit of Stegall to have preceded the marriage five or six weeks, and the birth to have followed it seven or eight months. But the proof is satisfactory, that the marriage did not precede the birth more than six months, so that the first visit of Stegall to the family cannot have taken place more than seven, or at most, eight months before the birth of the plaintiff, Jordan, and there was no reason to suppose that

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the birth was premature. There is, however, no testimony that the acquaintance between the parties commenced with this first visit, and although Stegall lived in Halifax county, in Virginia, about sixty or seventy miles from the residence of Catharine Newby, in Franklin county, in North Carolina, yet the presumption that he had no access to her before this visit, is not so violent as to contradict the conclusion which the law draws from the marriage, unaided by other circumstances.

This presumption, however, is supposed to derive considerable strength from the testimony, that according to the reputation of the neighbourhood, Jordan was the son of William Bowers; that Bowers claimed him, and that Catharine herself said that he was the son of Bowers.

If the declaration of the mother is admissible testimony, it would be entitled to great weight, if it should not be conclusive; but the counsel for the plaintiff contends, that these declarations are inadmissible. In arguing this point, the admissibility of the mother, as a witness, has been affirmed by the defendants and denied by the plaintiffs; but I think it unnecessary to decide this point, because the question before the Court does not, I think, depend upon it. If the mother could not be received as a witness, it follows that her declaration cannot be received as testimony against her son; and if she could be received as a witness, then her deposition ought to have been taken.(2)

(2) Mr. Selwyn, in his *Treatise on the law of Nisi Prius*, under the head of "Legitimacy," title, *Ejectment*, says, that "the wife is a witness of necessity as to the fact of adulterous intercourse, because that lies within her own knowledge, and she is the only person who may be supposed privy to it, except the adulterer. This case, therefore, affords an exception to the general rule, which prohibits the wife from being examined against her husband, in any matter affecting his interest or character. But non-access must be proved by other testimony than that of the wife, and this rule holds, though the husband be dead." So, in *The Commonwealth v. Shepherd*, 6 Binney 286, Chief Justice Tilghman said, that "the woman" (the husband, in that case, being alive, or not shown to be dead) "would be a competent witness, from the necessity of the case, upon common law principles. I do not mean that she would be a witness to all purposes, but only as far as the necessity extends, that is, to prove the criminal connexion. Further than that, she ought not to go; because every thing else is capable of proof by other persons, and nothing

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It is said, that hearsay is good evidence in cases of pedigree, and in cases of legitimacy; but it is the hearsay of persons who are dead, or whose testimony is unattainable. There is, I think, no case in which the declaration of one person can be admitted as evidence against another, when that person may be examined as a witness. I am compelled, therefore, to reject the declarations of the mother, whatever may be my private confidence in their truth.

The same principle applies to the declaration of Bowers, who is not proved to be dead, and who could, perhaps, go no further than to state his chance of being the father of the boy.

The general report of the neighbourhood, cannot be entirely disregarded; but the weight to which this, and all other hearsay testimony is entitled, depends on the circumstances of the case. Hearsay is admitted only from necessity; and its weight must depend on the circumstances of the case, and much on the remoteness of the time when the fact occurred, and the difficulty of producing any positive testimony respecting it. The supreme court has said, in the case of *Mima Queen and Child v. Hepburn*, 7 Cranch, that it will not extend the exceptions to the rule that hearsay is inadmissible further than they have been already carried.(3)

The result of the whole testimony is, that the presumption that Jordan is not the son of John Potter Stegall, is strong; but not so strong as to approach impossibility. It becomes, necessary, therefore, to inquire what degree of improbability has been considered by courts, as sufficient to overrule the conclusion of law.

but necessity will warrant the dispensing with the rule, that a woman shall not be a witness in a matter wherein her husband is concerned," &c. "That the wife may be a witness to the extent I have mentioned and no farther, I consider as well established in the cases of *The King v. Reading*, Cases. Temp. Hardw. 79, and *The King v. The Inhabitants of Bedel*, Cases. Temp. Hardw. 379, 2 Strange 1076, Andr. 8."—[*Editor.*]

(3) 7 Cranch, 290; 2 Cond. Rep. Sup. Ct. U. S., 496. Reviewed and confirmed in negro *John Davis et al. v. Wood*; 1 Wheat. 6; 3 Cond. Rep. Sup. Ct. U. S., 465. [*Editor.*]

The plaintiffs contend that the rule must prevail, unless there be a physical impossibility, that the husband can be the father. The defendants insist that the ancient rule is relaxed, and that the facts, like most others determinable by human tribunals, must depend on probabilities, and on the comparative weight of testimony.

Mr. Blackstone, in his Commentaries, Vol. I. p. 457, says: "That children born during wedlock, may, under some circumstances, be deemed illegitimate; as if the husband be out of the kingdom." "But, generally, during the coverture, access of the husband shall be presumed, unless the contrary be shown, which is such a negative as can only be proved by showing him to be elsewhere; for the general rule is *presumitur pro legitimatione*."

"After a divorce, *a mensa et thoro*, the children are bastards; but in a voluntary separation by agreement, the law will suppose access, unless the negative be shown."

Mr. Blackstone goes no further than to state the general presumption of law, and, consequently, that the *onus probandi* is thrown on him who would establish illegitimacy; but does not intimate that stronger testimony would be required to prove non-access, than in any other case of an *alibi*; in all which cases the degree of negative proof which is required, must depend, in some degree, upon the strength of the positive testimony. The fact of marriage, is the fact on which the plaintiffs rely as the positive testimony in this case; and it is the testimony on which the law erects the presumption of legitimacy; but it cannot be denied that a marriage, so early after conception, that the husband might not have discovered the pregnancy, does not afford so strong an inference in favour of his belief that he was the father of the child, as a marriage after the fact of pregnancy had become notorious.

In *Pendrell v. Pendrell*, 2 Strange, 925, the husband and wife parted after living together some months, she staying in London, and he going to Staffordshire. After a separation of three years, the plaintiff was born, and it being uncertain whether the



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husband had visited London within the year, an issue at law was directed; and upon strong evidence of no access, the legal presumption in favour of legitimacy was overruled, and the law left to the jury, whose verdict was against the plaintiff.

The case informs us that the evidence of no access was strong, but does not say what that evidence was. There is, however, no hint that it was such as to make access impossible. It is also observable that there was, probably, some doubt whether the husband had not been in London within the year. The circumstances are not fully stated in the case; but, so far as they are stated, there is no reason to suppose that there was any other proof of an *alibi*, than is afforded by the general residence of the husband in Staffordshire, and of the wife in London, without any testimony that he had visited London, or she Staffordshire.

It is worthy of observation that evidence was admitted that the mother was of ill fame.

The case of Goodright, lessee v. Saul et al., 4 D. & E., 356, turns upon the legitimacy of John T. Hales, whose title was set up by the defendant.

Elizabeth Tilyard, the great-grandmother of John T. Hales, had intermarried with Simon Kilburn, with whom she lived in Norwich some time without having any children. The husband then went away, after which, Elizabeth lived publicly with Joseph Hales, during which time a son, Joseph, was born, (from whom John T. Hales descended), who was always considered in the family as a bastard. It did not clearly appear where the husband was during this time, but one very old witness proved that he went to London, where it was supposed he remained, and returned to Norwich after the death of his wife. The son, Joseph, went by the name of Hales. The counsel for the defendant insisted on the presumption of law, in favour of legitimacy; and the judge instructed the jury, that though it was not absolutely necessary to prove the husband out of the realm in order to bastardize the issue, yet it was incumbent on the party insisting on that fact, to prove that the husband could not by any probability have had access to the wife at the time, which,

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he conceived, had not been shown in the present instance. The jury found for the defendant, and on a rule to show cause, a new trial was granted. Ashurst, J., said he was convinced he had laid too much stress on the necessity of proving non-access, when the husband was within the realm, by witnesses who could prove him constantly resident at a distance from his wife. That the husband in this case left the wife and went to reside at another place, as it was believed, in London, and that there was no direct evidence of his access: there was other evidence which went strongly to rebut the presumption of access; a very forcible circumstance was, that himself and his family had taken the name of his putative father.

The instruction given to the jury in this case was, that it was necessary to prove that the husband could not, by any *probability*, have had access to the wife, and that the testimony did not amount to such proof. This instruction was declared to be erroneous, and must have been so either in its general principle, or in the particular application of the principle. The general principle was, that it was necessary to show that the husband could not, by any *probability*, not *possibility*, have had access to the wife; and the particular application of the principle was, to the case of living openly with another man, and having a son at the time, who was considered in the family as the child of that other man, and who took the name of the putative father. This case shows clearly, that without positive proof of non-access, circumstances may rebut the presumption arising from marriage.

The case of *The King v. Luffe*, 8 East, 193, turned on the legitimacy of a child born in wedlock, where the proof of the non-access of the husband until within a fortnight of the birth, was positive. In the course of the trial, Lord Ellenborough said: "Where the thing cannot certainly be known, we must call in aid such probable evidence as can be resorted to, and the intervention of a jury must, in all cases in which it is practicable, be had to decide thereupon; but where the question arises, as it does here, and where it may certainly be known from the in-

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variable course of nature, as in this case it may, that no birth could be occasioned and produced within those limits of time, we may venture to lay down the rule plainly and broadly, without any danger arising from the precedent."

In giving his final opinion in the cause, the language of his lordship is much more positive. After stating cases which show that a natural incapacity of the husband to be the father, constitutes an exception to the rule of law, he adds: "And, therefore, if we may resort at all to such impediments arising from the natural causes adverted to, we may adopt other causes equally potent and conclusive, to show the absolute physical impossibility of the husband being the father; I will not say the improbability of his being such, for upon the ground of improbability, however strong, I should not venture to proceed." "The general presumption," he also said, "will prevail, except a case of plain natural impossibility is shown."

Justice Grose said: "In every case, we will take care, before we bastardize the issue of a married woman, that it shall be proved that there was no such access as could enable the husband to be the father of the child."

Justice Lawrence said: "It had been shown that imbecility from age, and natural infirmity from other causes, have always been deemed sufficient to bastardize the issue, all which evidence proceeds upon the ground of a natural impossibility that the husband should be the father of the child. Then why not give effect to any other matter which proves the same natural impossibility?"

Le Blanc lays down the old rule and says: "Afterwards, the rule was brought to this, that where there was an impossibility that the husband could have had access to the wife, and have been the father of the child, there it should be deemed illegitimate; and in *Goodright v. Saul*, the court held that there was no necessity to prove the impossibility of access, if the other circumstances of the case went strongly to rebut the presumption of access. If it do not appear, but that he might be the

father, the presumption of law still holds in favour of the legitimacy."

This is certainly a very strong case in favour of the opinion that positive proof of non-access is required to bastardize a child born in wedlock. The force of the decision, however, is in some degree diminished by two considerations; the first is, that access was clearly impossible. The question, therefore, was not whether illegitimacy might be proved where access was possible, but whether it was the legal consequence of the impossibility of access. When the judges proceeded to recognise the rule that legitimacy must be presumed where access was possible, they undoubtedly travelled out of the case before them; and although these *obiter* opinions are entitled to great respect, they do not stand on the same ground with opinions given on the very point which is decided.

The second consideration is, that the case of *The King v. Luffe*, was not a jury cause, but a case to be decided entirely by the court; and unless we suppose Lord Ellenborough to have changed his view of the case on hearing the whole argument, this circumstance was not without its weight; his language during the trial certainly countenances this idea.

It is not entirely unworthy of remark, that though the Chief Justice and Grose, Justice, lay down the rule positively, Lawrence, Justice, avoids it, and Le Blanc, Justice, is not so explicit as the two whose opinions were first given.

This question is said in Phillips's *Law of Evidence*, p. 118, to have been afterwards considered by the judges in the case of the Banbury claim of Peerage, in which, Phillips says: "The principle laid down in the case of *Goodright v. Saul*, was affirmed." "It was held that where the husband and wife are not proved to be impotent, and have had opportunity of access to each other during the period in which a child could be begotten and born in the course of nature, the presumption of legitimacy arising from the birth of the child during wedlock, may be rebutted by circumstances inducing a contrary presumption;

and the fact of non-access, (that is, the non-existence of sexual intercourse,) as well as the fact of impotency, may always be proved by means of such legal evidence, as is strictly admissible in every other case where a physical fact is to be proved."

I have searched in vain for a report of this case, and must, therefore, be content with the statement Phillips makes of it.(3)

The case of *Bowles v. Bingham*, 3 Munf. 599, is also a very strong case in favour of the presumption of law in favour of legitimacy, and the judge who delivered the opinion, unquestionably admits the law to be, that legitimacy must be presumed unless its impossibility be shown; but the same opinion shows that in the actual case, intercourse between the husband and wife at the time of conception, was probable, and the decision was in favour of the injured party.

The conclusion to which I am brought by a comparison of the cases I have had an opportunity of examining, is, that the presumption of law is in favour of the legitimacy of a child born in wedlock, but that this presumption may be rebutted by other testimony, which does not go to the full extent of absolute impossibility. I will not say that mere probability is enough; I think it is not enough; the known connexion of a woman with another man while she cohabited with her husband, or might, upon any reasonable calculation, be supposed to have intercourse with him, would weigh as nothing. In such case as this, if the marriage had taken place in such an advanced state of pregnancy, that the situation of the wife must have been known to the husband, I should be disposed to consider it as a recognition of the child afterwards born. Any conduct of the husband after the birth, indicating a belief that the child was his, would have been entitled to great weight, and would probably have been decisive; but in this case, the marriage took place when the pregnancy was probably unknown. The ac-

(3) 1 Wheat. Selwyn's Nisi Prius, *ubi supra*, p. 613, 4th Am. from 7th Lond. ed.—[Editor.]

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quaintance between the parties, most probably commenced too late for the husband, according to the law of gestation, to be the father of the child afterwards born; the common opinion of the neighbourhood gave the child to another man; the boy grew up, not in the household of Stegall, not looking upon him as a father, not being considered as a son, and the presumption of law derives no aid from the reputation of the woman. Under all these circumstances, the Court would be restrained from directing an issue, only by the opinion that the presumption of law must prevail, unless it be clearly impossible that the husband can be the father of the child. As I am not of that opinion, but think that this presumption of law may be rebutted by testimony which places the negative beyond all reasonable doubt, I shall direct an issue to try the legitimacy of the plaintiff, Jordan R. Sherwood.(4)

(4) The opinion of Chief Justice Marshall, in the above case of *Stegall v. Stegall*, is fully sustained by the opinion of the Supreme Court of Pennsylvania, in the case of the *Commonwealth v. Shepherd*, cited *ante*, note (2) p. 262. That was a criminal prosecution against Shepherd for fornication with Sarah Myers, and begetting a bastard child by her. Sarah Myers, the prosecutrix, was married in 1801. She lived with her husband two or three years after the marriage, when he went away to New York, where he had resided ever since. The father of the prosecutrix took her back to his own house in Kensington, and she had, for the most part, uniformly resided under his roof. When absent, in 1811, and the following spring for three months, engaged as a nurse in different places, the defendant frequented her company, was with her late at night when the families had gone to bed, and once was with her all night. Her husband was not known to have been in her company for several years prior to the birth of the child, which took place, (by the testimony of the mother), on the 24th of December, 1812. But a witness swore that he saw Myers, the husband, in the Philadelphia market, on the 10th of June, 1812, and it appeared that he was seen at the same place, about a month before, and also in the spring of 1811. The prosecutrix also swore that the defendant had promised to marry her, had frequent criminal connexion with her, and was the father of the child. She did not know whether her husband was dead or not; and the counsel for the prosecution in the court below, asked her *when she last saw her husband?* To this question the defendant's counsel objected, and, after a long discussion, the judge overruled the objection, and she answered that she had not seen him for eight years. In his charge to the jury, Yates, J. said, that if, upon a consideration of all the evidence, they should be of opinion that the husband had not had access to

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It will be unnecessary again to go through the law of the case in relation to the claim of Martha Wright. The probability that she is legitimate, is not stronger than that in favour of her brother, and I shall direct an issue as to her likewise.

It will be unnecessary to discuss the rights of the defendants, until this issue shall be tried.

NOTE.—The Court directed that issues be made up and tried at the next term, to ascertain whether the plaintiffs, Martha Wright and John R. Sherwood were the children of John Potter Stegall, or not. At the November Term of the court, 1825, the cause was continued until the next term, and leave given the parties *ad interim*, to take further testimony, each party giving due notice to the other of the time and place of taking the same. At the May Term ensuing, a jury was empannelled to try the above issues and after very full argument, the jury not being able to agree on a verdict, were discharged. Another jury was empannelled at the December Term, 1826, to try the same issues, and the case was again very laboriously argued, but this jury being also unable to agree upon a verdict, was likewise discharged. On the 6th day of June, 1827, the Court, MARSHALL, C. J. and HAY, J. being present, on the motion of the plaintiffs, set aside the order of June, 1825, directing issues to be made up and tried to ascertain the legitimacy

his wife, and that the child was really begotten by the defendant, they might find him guilty of both fornication and bastardy; but that they were not to consider any thing that fell from Sarah Myers as evidence of non-access. Per TILGHMAN, C. J., "In this the judge was clearly right. In old times it seems to have been holden, that a child born of a married woman, whose husband was within the four seas which bounded the kingdom, could not be considered as illegitimate. This was unreasonable. When the husband has access to his wife, it is right that no evidence, short of absolute impotence of the husband, should bastardize the issue. But when they live at a distance from each other, so that access is very improbable, the legitimacy of the child should be decided upon a consideration of all the circumstances. The law was laid down in *Pendrell v. Pendrell*, in the fifth year of Geo. II., 2 Strange, 925, and has ever since been considered as settled." On the question of the competency of the wife as a witness, see note of this same case, *supra*. [Editor.]

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or illegitimacy of the two plaintiffs, Martha Wright and Jordan R. Sherwood, and proceeded to render a decree, an extract from which is subjoined.

"The Court is of opinion that the plaintiff, Catharine Stegall, formerly Catharine Newby, who was lawfully married to John Potter Stegall, now deceased, in the latter part of the month of December, 1789, was his, the said John Potter Stegall's lawful wife; but as it is in proof, that the said Catharine willingly left her said husband, and for many years before, and at the time of his death, lived in adultery with another man, she is, for that cause, by the act of assembly of Virginia, in such case made and provided, barred of all claim to dower of the lands of her said husband; and yet, not being precluded by the laws of Virginia, on account of her separation from her husband, and adultery, from her share of her said husband's personal estate, she is entitled to a widow's share of the distributable surplus of the said John Potter Stegall's personal estate. The Court is further of opinion, that upon the proofs in the case, considered in reference to the principles of law applicable to such case, the plaintiffs, Jordan R. Sherwood and Martha Wright ought, and are to be deemed the legitimate children of the said John Potter Stegall, deceased, by his wife, the said Catharine. The Court is further of opinion, that the marriage of the said John Potter Stegall, deceased, with Susannah Portwood, after his marriage with the plaintiff, Catharine, and while his wife, the said Catharine, was living, was null and void, and that the said Susannah Portwood was not entitled either to dower of his real, or to a distributive share of his personal estate; but that, nevertheless, by the act of assembly of Virginia, in such case made and provided, the defendant, Nancy Smith, daughter of the said Susannah, by the said John Potter Stegall, born after the said illegal marriage of her said parents, and during the coverture, and the defendant, Elizabeth Jennett, daughter of the said Susannah, born before her said marriage with the said John Potter Stegall, but recognised by him after his marriage with her mother, and during the coverture, as his, the said



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John Potter's child ought, and are, both to be deemed the legitimate children of the said John Potter Stegall. Consequently, the Court declares, that the said Jordan R. Sherwood, Martha Wright, Nancy Smith, and Elizabeth Jennett are the lawful heirs and distributees of the said John Potter Stegall, deceased, entitled each to an equal share of his real and personal estate." [Editor.]

# Circuit Court of the United States.

NORTH CAROLINA, SPRING TERM, 1825.

BEFORE

HON. JOHN MARSHALL, Chief Justice of the United States.

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## THE UNITED STATES V. COCHRAN ET AL.

An Act of Congress, (Act of March 3, 1797, sec. 5), declares, that where a revenue officer, indebted to the United States, shall become insolvent, the debt due to the United States shall first be satisfied, and that this priority shall extend to cases where a debtor, not having a sufficient property to pay all his debts, shall make a voluntary assignment thereof. *Held*, that although this act gives to a debt due to the United States a priority over debts due to individuals, it does not give to one part of a debt due to the United States a priority over any other part of it; nor does it vest the property absolutely in the United States, though it gives them a right to pursue it for the purpose of appropriating it in payment; nor does it affect the right of the debtor to *apply a payment* of money in his hands to either a bond debt, or a debt due by open account by him to the United States.

Therefore, where a collector of the revenue at a port, had given bond with sureties in the penalty of \$10,000, for the faithful discharge of his official duties, and being largely indebted to the United States, had made a deed of his property for their benefit, but previously thereto, had transferred \$10,000 to his sureties, and directed them to apply that money to their exoneration, and the sureties accordingly did so apply it, by paying it into the treasury, and receiving from the

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treasury their obligation, without any knowledge at the treasury that the money so paid had been transferred by the collector himself to his sureties; it was adjudged that by applying that payment to the extinguishment of the bond, the sureties were discharged.

AN information was filed in the Circuit Court of the United States for the District of North Carolina, against Robert Cochran, late collector for the port of Wilmington in that state, and J. E. and J. W., his sureties, to recover from the sureties the sum of \$10,000, that being the penalty of Cochran's official bond. The information charged, that the said Cochran being largely indebted to the United States beyond his ability to pay, viz., in the sum of \$145,361, two several suits were instituted, the one against Cochran, the principal, and the other against his sureties, and that judgments had theretofore been obtained against each in the Circuit Court of the United States for the District of North Carolina; that the judgment against the sureties (for \$10,000) had been satisfied by them, but the execution sued out on Cochran's judgment had proved unproductive; that Robert Cochran, intending to defraud the United States, &c., on the 25th of September, 1820, conveyed by deed of that date, to W. W. J. and J. W., (the latter of whom was one of his sureties) all or nearly all of his *visible* property in trust, for the benefit of the United States, but that nevertheless the said Cochran was possessed of a large sum of money, which he placed in the hands of J. W., one of his sureties, or others, upon a secret trust, out of which the judgment against the sureties was satisfied. The information charged, that the original liability, by reason of the defalcation of their principal, was unimpaired by the payment by them of \$10,000 out of the funds of Robert Cochran, and prayed for relief, &c.

The answers of Cochran and his two sureties disclosed, *inter alia*, the following state of facts, viz.: That on the 18th of August, 1820, in order to indemnify his sureties, Cochran had put up, in bills of North Carolina banks, the sum of \$10,000, in two separate packages of \$5000 each, sealed up and addressed to the sureties respectively, which were placed in a trunk, and the

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trunk was deposited in the bank of Cape Fear, at Fayetteville, of which bank J. W., the surety, was cashier. Cochran, in his answer, insisted that he was thus divested of all right and title to the said money, though he admitted that he did not inform his sureties of the said transfer, believing it to be complete without any such communication. He farther answered, that he did not, at the time of making the transfer, contemplate the execution of the deed of the 25th of September, 1820, referred to in the information, or committing any other act of legal bankruptcy, by absconding or otherwise, but that the appropriation of the \$10,000 and the subsequent execution of the deed, were totally distinct transactions in fact and in design: That a few days after the transfer of the money, he went to Wilmington in the execution of the duties of his office as collector, and having there received official notice of his re-appointment, by which he was required to renew his bond in the sum of \$30,000, in pursuance of the act of Congress, and being resolved not to involve his friends by giving a new bond, the propriety of making an assignment of his property then *first* occurred to him, and without the counsel or knowledge of any person whatever, he executed the deed on the day of its date, at Wilmington. That he carried the deed with him to Fayetteville early in October, 1820, and deposited it in the trunk in the bank of Cape Fear, containing the package of money: That having determined to retire from office, and under the influence of feelings too poignant to endure the shock among his friends, which would be produced by the publication of his default, he determined to go to the *North*. From Baltimore he addressed a letter to J. W., one of his sureties, and cashier of the bank of Cape Fear, informing him that he had deposited the two packages of money in the trunk before referred to, and desiring him to deliver to his co-surety, J. E., the package superscribed with his name, and to retain the other. The sureties, in their answer, averred, that this letter was received, and the money applied to the satisfaction of the judgment against them accordingly, and that their bond was thereupon surrendered by the treasury.

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At the Spring Term, 1825, the cause was argued, as to the sureties, on the information and answers above recited, and the Chief Justice delivered the following opinion of the Court.

**MARSHALL, C. J.**—In this case Robert Cochran, collector, at the port of Wilmington, being very largely indebted to the United States, made a deed of his property for their benefit. Previous to the execution of this deed, he deposited \$10,000, the amount of the bond executed to the United States, for the faithful performance of his duty, in a trunk which was placed in the bank, and absconded. From Baltimore he addressed a letter to his sureties, requesting the trunk to be taken out of the bank, and the money to be applied to their exoneration.

The money was received at the treasury and the bond given up. It being afterwards discovered that this was the money of the collector and not of the securities, this suit is brought to compel the securities to pay the amount of the bond, considering the money received as constituting no equitable discharge to them.

It is contended on the part of the United States, that the insolvency of Cochran, vested all his property, including this \$10,000, in the United States, and that this sum being theirs could not be applied in exoneration of his securities.

The act of Congress declares, that where any revenue officer, &c., indebted to the United States, shall become insolvent, the debt due to the United States shall be first satisfied, and that this priority shall extend to cases where a debtor not having sufficient property to pay all his debts, shall make a voluntary assignment thereof.(1)

This act does not transfer the property itself to the United States, but subjects it to their debt in the first instance.

The assignee holds it as the debtor would hold it, liable to the claim of the United States, and if he converts it to his own use, or puts it out of reach of the United States, he is undoubtedly responsible for its value.

(1) Act of March 3, 1797, sec. 5; See 1 Story's Laws U. S. 465.—[Editor.]

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But the property thus liable to the United States, is liable for the whole debt; for one part of it as much as for the other. It is as applicable to the bond in which the sureties are bound, as to that part of the debt for which the principal alone is responsible. No person will doubt the legal capacity of the United States to apply any sum of \$10,000, to the discharge of the bond-debt, leaving the residue unpaid. Such an application of a payment would undoubtedly never be presumed from any equivocal act; but a plain and positive appropriation of a payment to the bond, could not afterwards be set aside.

But the power of the debtor to apply his payments, is co-extensive with that of the creditor, and is to be exercised in the first instance. This principle has, it is believed, never been denied. If it be correct, then the power of Mr. Cochran to apply this sum of money in discharge of the bond, and in exoneration of the sureties to it, is co-extensive with that of the United States to make the same application of it. If, then, Mr. Cochran had, without any assignment of his property, paid this money into the treasury, with a direction that it should be applied to the bond, he would have exercised a right which the law gives to every debtor.

If the money should be received under this direction, no doubt can be entertained of the obligation to apply the payment as directed. If it should be rejected, it might be tendered in due form, and to suits brought on the bond, and on the open account a tender might be pleaded to the suit on the bond, unless some distinction can be taken between this bond, and the common case of a bond given for part of a debt. The Court has reflected on this distinction, and cannot perceive any legal difference between the cases.

Does the transfer of this money to the sureties change the law of the case? We think not.

The sureties have paid it into the treasury in discharge of their bond, which has been delivered up. Had this transaction taken place, with the full knowledge of the treasury department, that the money had been received by the sureties from Mr.

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Cochran, no question could have arisen respecting it. Is the payment the less valid because it was made without communicating this circumstance?

If the United States have sustained any injury by the concealment, equity will relieve against that injury, and place them in the situation in which they stood before the payment was made. If, with full knowledge of the circumstance, the money might still have been legally applied in discharge of the bond, then, the fact that it was not communicated cannot change the law.

It has been very properly argued, that the act of Congress gives to the debt due to the United States priority over debts due to individuals, but not to one part of the debt due to the United States over any other part of it; nor does it vest the property absolutely in the United States, though it gives them a right to pursue it for the purpose of appropriating it in payment. It would seem to follow, that the right to apply payments while the money is in the hands of the debtors, is not affected by the act of Congress, but remains as it would stand, independent of that act.

If, then, the sureties had declared to the treasury department that the money was received from Mr. Cochran, to be paid in discharge of their bond, and had tendered it in payment thereof, we think the tender would have been valid, and might have been pleaded to a suit on the bond.

We are of opinion, therefore, that this suit must be dismissed as against the sureties.

# **Circuit Court of the United States.**

**VIRGINIA, MAY TERM, 1826.**

**BEFORE**

**HON. JOHN MARSHALL, Chief Justice of the United States.  
HON. GEORGE HAY, District Judge.**

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## **THE UNITED STATES V. SOLOMON BELEW.**

A mail carrier is within the 18th sec. of the "Act regulating the Post-Office Establishment," subjecting to a penalty in certain cases, "persons employed in any of the departments of the General Post-Office."

THE prisoner was indicted for secreting and embezzling sundry letters, and stealing therefrom divers bank notes, which had come into his hands as the carrier of the mail of the United States, between Charlottesville, in Virginia, and Richmond, in the same state, and the jury found the prisoner guilty. The counsel for the prisoner then moved in arrest of judgment, on the ground stated in the following opinion :

**MARSHALL, C. J.**—The prisoner is convicted under the 18th



section of the "Act regulating the Post-Office Establishment,"<sup>(1)</sup> and the question submitted to the consideration of the Court, is, whether a carrier of the mail be, "a person employed in any of the departments of the general post-office?"

To answer this question, it becomes necessary to settle the meaning of the word "department," as used in the act of Congress. One of its significations, as our lexicons inform us, is, "a province or business, assigned to a particular person." The business assigned to a particular person, is, according to this definition, in his department. The business belonging to the post-office, is in a department of the post-office; a person employed in that business, is a person employed in a department of the post-office. If, then, the carrying of the mail be a part of the business of the post-office, it would seem that the person who carries it, is a person employed in a department of the general post-office.

The first section of the act, makes it the duty of the postmaster-general, "to provide for the carriage of the mail on all post roads that are, or may be, established by law." The carriage of the mail, then, is a part of the business of the postmaster-general; it is within his department, and a person employed in it, is employed in a department of the general post-office. There are several other sections of the act which obviously contemplate the carrier of the mail, as a person who is, particularly, within the purview of the statute. The second section enacts, that "the postmaster-general and all other persons employed in the general post-office, or in the care, custody, or conveyance, of the mail," shall take an oath prescribed by the law. But "every person who shall be in any manner employed in the care, custody, conveyance, or management, of the mail, shall be subject to all pains, penalties, and forfeiture, for violating the injunctions, or neglecting the duties required of him by the laws relating to the establishment of the post-office and post-

(1) Act of April 30th, 1810, 2 Story's Laws U.S. 1156; repealed by Act of 1825; ch. 275.—[Editor.]

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roads, whether such person shall have taken the oath above prescribed or not."

It is apparent from this section, that the framers of the act designed to provide particularly for the punishment of offences committed by persons carrying the mail; they are supposed to be subjected to particular "pains, penalties, and forfeitures." Yet it is by sec. 18, only, that these pains and penalties are inflicted, and they are described only as "persons employed in a department of the general post-office." We say it is by this section and this description only, that these pains and penalties are inflicted on the carriers of the mail, for stealing a letter out of the mail, because we believe that the 19th section is not intended to be applicable to them.(2)

The counsel for the prisoner supposes that no person can be the object of the 18th section, who is not appointed directly by the postmaster-general, or for whose appointment a special provision is not made by the act. He insists that he must be an *officer*. But this is not the object of the law; the terms of the enactment do not require an officer; they are satisfied with an agent, or any person employed in any of the departments, or, in other words, in the business allotted to the general post-office. Nor do they require that he shall be employed by the postmaster-general, or by authority expressly delegated by him; it is enough to satisfy the law, that they are so employed. The contractor

(2) The 18th section of the law regulating the post-office establishment, provided, that if any person employed in any of the departments of the general post-office, shall *secrete, embezzle, or destroy*, any letter, packet, bag, or mail of letters with which he shall have been entrusted, or which shall have come to his possession, and are intended to be conveyed by post, containing any *bank note, or bank post bill, &c.*, or shall *steal or take* any of the same out of any letter, &c., that shall come to his possession, he shall, on conviction for any such offence, be imprisoned not exceeding ten years, &c. The 19th section of the same law declared, that if any person shall *attempt to rob the mail, &c.*, he shall be punished, on conviction, by imprisonment not exceeding seven years, &c.; and if any person shall *steal the mail, or steal or take from any mail, &c., whether with or without the consent of the person having the custody thereof, &c.*, such offender shall be punished, &c.—  
[Editor.]

cannot himself carry the mail through the whole extent of his contract; and the law contemplates his employing other persons. The 4th section provides, that these shall be free white persons, and subjects the contractor to a penalty for employing others. The mail-carrier, then, is, in this section also, specially the object of the act.

The reason, as well as the language of the law, leads to the opinion, that all persons intrusted with the mail, should be alike subjected to the penalties of the law for a fraudulent violation of the trust reposed in them; the carrier of the mail is as much intrusted with it, as the person who makes it up and places it in his custody, and there are the same motives for subjecting him to the penalties inflicted on the violators of that trust. If, then, as we think, the words employed do, in their natural import comprehend him, the Court would not be justified in a strained construction, to exclude him from their operation.

The counsel for the prisoner maintains that the act does, in its language, distinguish between a mail-carrier, and the persons to whom the 18th section of the act applies. He supposes that the concluding sentences of the 18th section exhibit this distinction. We do not think so. The preceding part of that section, enumerates offences which may be committed by any person intrusted with the mail, or with the letters to be carried by the post, and in that part, the offenders are described in general terms. The concluding sentences, enumerate offences which can be committed only by the person carrying the mail, and in those sentences, he is mentioned particularly.

The 19th section, too, enumerates particularly the offences which may be committed, and, in the recital, mentions both the mail-carrier and the post-office. This distinguishes them from each other, but does not indicate that either is not comprehended in the general terms of the 18th section. Those general terms are not introduced in the 19th section, nor was it necessary that they should. Their absence no more proves that a mail-carrier is not employed in any of the departments of the general post-office, than that the person who receives the mail or delivers out the letters, is not so employed.

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The United States v. Below.

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The counsel also supposes that sec. 2, distinguishes between a person employed in the departments of the general post-office, and a mail-carrier. But we cannot concur in this opinion. The language is, "That the postmaster-general, and all other persons employed in the general post-office, or in the care, custody, or conveyance of the mail, shall, &c."

It is obvious that this section, in using the terms "persons employed in the general post-office," designates the general post-office itself, and uses a phrase more limited, and intended to be more limited, than the phrase "any person employed in *any department* of the general post-office." It excludes persons employed in the particular post-offices established in the several states. These are comprehended by the words, "care or custody" of the mail. These words comprehend all persons who have the "care or custody" of the mail, and are not comprehended by the words, "other persons employed in the general post-office." But the separate enumeration of individuals in this section, no more proves that the one, than that the other is not comprehended within the general term which designates them all. It no more proves that the person carrying the mail is not employed in any of the departments of the general post-office, than it proves that a person having the care or custody of the mail in a particular post-office, is not within any of those departments.

The decisions of the English courts, showing the strict construction which has been given to the law, will not apply to this case, because we think a mail-carrier is within the very words of the 18th section of the act of Congress.

Motion in arrest of judgment overruled, and the prisoner sentenced to imprisonment for seven years.

## Circuit Court of the United States.

VIRGINIA, NOVEMBER TERM, 1826.

BEFORE

HON. JOHN MARSHALL, Chief Justice of the United States.  
HON. GEORGE HAY, District Judge.

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MANUELA GRIVIGNIE Y GALLEGO, wife of HENRY NEWMAN, (by her next friend,) v. PETER J. CHEVALLIE, Surviving Executor of JOSEPH GALLEGO, deceased.

A court of equity will sustain the bill of a married woman, suing by her next friend, to recover a legacy bequeathed to her, where the husband has transferred all his marital rights in the legacy to his wife.

A legacy, until it is recovered, is a *chose in action*, and the marital right of the husband to his wife's legacy does not attach, until it is reduced into possession. He may, indeed, sue for it, and reduce it into possession, but so long as it continues a *chose in action*, it is the property of the wife.

A relinquishment by the husband, of his marital right to a legacy bequeathed to his wife, is valid as to the creditors of the husband, and a court of equity will not interpose its authority to compel the husband to reduce the legacy into his possession, for the purpose of subjecting it to their claims.

Parol evidence is not admissible to affect the construction of a will, but it is admissible where its introduction is required by considerations extrinsic of the will, and which, necessarily, depend upon such evidence.

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Gallego v. Gallego's Executor.

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Where the testator advanced money in his lifetime to a *husband*, whose wife was a relation, and would be, at his death, an heir and distributee of the testator, and directed that the husband should be debited with the amount, that it might be deducted, after the testator's death, "from the share coming to the family;" and the testator *afterwards* made his will, bequeathing a legacy to the *wife*: *Non constat*, that the testator designed that the advance made to the *husband* should be deducted from the legacy bequeathed to the *wife*. The whole legacy was decreed to be paid to the wife, without discounting the husband's debt.

THE case was stated, and the opinion of the Court was delivered by

MARSHALL, C. J.—The plaintiff, who resides in Spain, claims a legacy bequeathed to her by Joseph Gallego, deceased. The executor admits assets, and submits the question to the Court, whether the plaintiff, as a married woman, can properly demand this legacy? The demand is supported by an instrument of writing, executed by the husband, in which he transfers all his marital rights in this legacy to his wife, and gives her full authority to receive it. Under these circumstances, the course of a court of equity is, to sustain the bill of a married woman, brought by her next friend, and to decree that the legacy shall be paid to herself. But, admitting her right to sue, the executor contends that her husband was indebted to his testator, and that this debt ought to be deducted from the legacy. He also says, that a creditor of the husband has attached a part of this money in his hands in the court of the state, and he submits it to the Court to say, whether he is not bound to retain a sum sufficient to answer this demand?

This defence makes it necessary to inquire into the right of the husband to a legacy bequeathed to his wife, and into the rights of the creditors of the husband to such legacy.

The common law of England identifies the wife so entirely with her husband, as scarcely to tolerate the idea of her separate existence while they live together. She cannot acquire personal property by a direct conveyance to herself. Her interest is, by act of law, almost in every instance, transferred to her husband, and becomes vested in her. But this rule does not

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apply to personal estate to which a female is entitled before marriage, and which has not been reduced to possession. This remains her property, and does not vest in the husband by the marriage. The marital right does not extend to the property while a *chose in action*, but enables the husband to reduce it to possession, and thereby acquire it. The property becomes his, not upon the marriage, but upon the fact of his obtaining possession.

The right of the legatee does not originate in the common law, and is not governed by the old rule, which disables the wife from taking for her own benefit. It is a right which cannot be asserted at common law, and can be sustained only in a court of equity. The personal estate of the testator vests in the executor for the payment of debts, who is a trustee for the legatee, after the primary trust for creditors shall be satisfied. As courts of equity grew up under the control of civilians, they have adopted the principles of the civil law, which views the rights of married women with much more liberality than the common law. Legacies, therefore, bequeathed to a married woman, have never been classed with conveyances at common law, but with *choses in action*, and vest an equity in the wife herself, in which the husband participates, so far only, as to assert her title in a court of equity. The property does not become his, nor is it subject to the liabilities which attach to that which is his, until it shall be reduced to possession. Till then, his creditors have no claim to it. If he dies, living the wife, before reducing it to possession, his power is not transmissible to his representatives, but dies with him. Since the claim of the creditor extends only to the property of the debtor, it cannot reach a legacy until it becomes his property. It follows, then, not only because mere rights cannot be taken in execution without the aid of some special legislative provision, but because, also, there is no title in the husband to the thing itself, that a legacy not reduced to possession, is not liable for his debts. Can a court of equity subject it to them?

The books furnish no case in which this naked question has

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been brought before the Court. This is, of itself, a strong, we think, conclusive argument, against the right. That a creditor has never applied to a court of chancery to interpose in his favour, and subject the *choses in action*, or the equitable rights of the wife, to his claim against the husband, demonstrates the universality of the opinion, that equity affords no aid in such a case. It is true, that the assignees of a bankrupt are permitted to assert this right. But it is equally true, that they represent the bankrupt, as well as his creditors, and that all the marital rights of the husband are transferred to them. When they come into a court of equity, asserting a claim on the equitable interests of the wife, they exercise the marital right to reduce those interests to possession, not any pre-existing right of the creditors. In such a case, the court grants its aid, on such conditions as its own rules prescribe, and will never permit the husband, or his assignees, to receive the property of the wife, but on such terms, on making out of it for herself and children such provision, as, on a view of all the circumstances of the case, may be deemed equitable. This uniform course of a court of equity, would be incompatible with a previously existing right in the creditors. This rule has never been recognised, so far as we are informed, in the courts of Virginia, but it has never been denied, and we can conceive no principle on which it should be denied. That those who ask equity should do equity, is a fundamental rule of that court, which enters into, and mingles with, all its decisions; and that the property of a married woman should not be taken from her, without making some provision for her, is as equitable in Virginia, as elsewhere.<sup>(1)</sup> Our statute of distributions, does not, we think, alter the case, by making

(1) The English books abound with cases establishing this rule of equity, and the principle has very generally been adopted in this country. See *ex parte*, Beresford, 1 Desaussure, 263; Howard and wife v. Moffatt, 2 Johns. Ch. Rep. 306; Glen and wife v. Fisher, 6 Johns. Ch. Rep. 33; Kenny v. Udall, 5 Johns. Ch. Rep. 464; Udall v. Kenney, 3 Cowp. 606; Fabre and wife v. Colden, 1 Paige, 166; Carter v. Carter, 1 Paige, 463; Mumford &c. v. Murray, 1 Paige, 620; Smith &c. v. Kane and wife, 2 Paige, 303. This rule is adverted to and commented on by Green, J., in Gregory's Administrator v. Marks's Administrator, 1 Rand. 372.—[Editor.]



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Gallego v. Gallego's Executor.

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the husband a purchaser of equitable interests which may come to the wife during marriage. We can find no case in which a husband has been considered a purchaser of the equitable interests, or *choses in action* of the wife, without some specific agreement by which he becomes so: and the act of assembly contains no declaration to that effect. It would be unreasonable to put this construction on it by implication, because the consideration supposed to be given by law for her estate, remains in the power of the husband. The court of chancery will not enable a freeman of London<sup>(2)</sup> to obtain the personal estate of his wife, without a settlement on her. Suits have been brought to assert the marital right of reducing her property into possession, but in no case that we have seen, has her equitable right to a maintenance been doubted. Were this a suit by the husband and wife for her legacy, the Court would, certainly on the application, in England, without such application, direct a reasonable provision for her maintenance. As the case stands, the husband has relinquished his marital rights in this subject, and the question is, whether a court of equity will disregard or control this relinquishment in favour of creditors. As a general question, we can find no precedent for doing so. The husband has no interest in the legacy; he has only a power to make it his by reducing it to possession. Till this power is exercised, the property remains hers. We can find no case, in which creditors have required the aid of the court, to compel the husband to reduce it to possession, or in which a court has restrained the effect of a previous relinquishment of this marital right on the part of the husband. As a general proposition, we should consider this relinquishment valid against creditors; and if it is not so on the present occasion, its invalidity must be produced by the particular circumstances of the case.

What are those circumstances? In August, 1814, Henry Newman, the husband of the plaintiff, drew bills on Joseph Gallego, the testator, for \$2000, and at the same time, addressed a letter

(2) *Adams v. Pierce*, 3 P. Wms. Rep. 11.—[Editor.]

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Gallego v. Gallego's Executor.

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to him, soliciting his acceptance of them, and promising repayment. These bills, with the letter of Mr. Newman, were presented to Mr. Gallego, in Baltimore, in June, 1815, who accepted them, and made arrangements for their payment in Richmond. He communicated the transaction to Mr. Poiton, his partner in this place, in a letter which contains this sentence: "Be so good as to debit Mr. Henry Newman, senior, to notes payable, for the sake of form, and that the amount may appear against him or his heirs, when I am no more, to be deducted out of the share coming to the family." It also appears, that this debt was charged to Newman on the books of the testator, and remained on his books till his death. His will was made in the year, 1818.

Some objection was made to the admission of the letter from Mr. Gallego to Mr. Poiton, the plaintiff considering it as irrelevant, since parol and extrinsic testimony, cannot affect the construction of a will. It is undoubtedly true, that this letter cannot affect the construction of the will, nor does the Court look into it with that view. If it has any bearing on the question under consideration, it is on an entirely distinct part of it.

Although the legacy given to the wife does not become the property of the husband, unless reduced to possession, yet he has a right to reduce it to possession, and may demand the aid of a court of equity for that purpose, which aid will be furnished as of course, unless the Court be restrained from affording it, by considerations which are never disregarded. These considerations are extrinsic of the will, and depend on parol testimony. Such testimony must be admitted for this purpose. In cases where the husband does not voluntarily relinquish his claim to a legacy bequeathed to his wife, but asserts that claim in equity, if a distinct claim be also asserted for the wife, the Court does not, as a matter of course, settle the whole on the wife as her separate property, but secures the whole, or part of it to her, according to circumstances. Where, as in this case, the husband voluntarily relinquishes his marital rights, the Court will, undoubtedly, sustain that relinquishment, unless it be made in fraud of the rights of others.

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In this case, there is reason to believe, that the husband is insolvent, and that he has relinquished to his wife that she may receive and enjoy the legacy bequeathed to her, secured from his creditors. In this, there is no injustice ; his creditors trusted to his own resources for payment of their claims, and had no right to count on the fortune of Mr. Gallego. Creditors, generally, therefore, cannot compel him to reduce the legacy of his wife to possession for their benefit ; but the application of this rule to a creditor, who is in rightful possession of the legacy, and has probably trusted the husband in the confidence that the means to secure repayment are in his own hands, is very much questioned. The relinquishment of the husband, and the consequent separate claim of the wife, may be considered as parts of the same transaction, and if the relinquishment was iniquitous, the claim, so far as it depends on that relinquishment, cannot be supported. If it was perfectly clear that the testator, at the time of making his will, or at the time of his death, intended this advance to the husband to be set off against the legacy to the wife, the Court would feel great difficulty in disappointing such intention. But this is not perfectly clear ; the debt is due from Newman, the legacy is given to his wife. The debt, therefore, may still exist, and yet not be a set-off against the legacy. Had the money been advanced subsequent to the date of the will, there would have been more reason for considering it as satisfaction in part for the legacy, but even then, it would not necessarily be so considered.(3) But this advance being made anterior to the will, gives countenance to the opinion that the testator did not intend it as a deduction from the legacy. The will being subsequent, and to a different person, furnishes probability to the opinion, that if a provision for the debt had been in the mind of the testator, his will would have given some indication of his intention respecting it. It is also a consideration not to be disregarded, that the fund out of which this legacy is to be paid, does not comprehend the debt due from Newman.

The circumstances of the parties, and, indeed, the two letters

(3) 2 Atk. 516.—[Editor.]

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*Gallego v. Gallego's Executor.*

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introduced into the cause, lead to the opinion that the testator made frequent advances to his relations, and that this particular advance might not be in his mind, when his will was made.

The Court does not perceive in the case, any satisfactory evidence that equity ought to restrain the full operation of the instrument by which Henry Newman relinquishes his marital right in this legacy to his wife, and is, therefore, of opinion, that it ought to be allowed its full effect.

**NOTE.**—The decree rendered in this cause, directed the defendant, Chevallie, to pay to the plaintiff her legacy, without discounting therefrom the \$2000, due from the plaintiff's husband to the defendant's testator, but left open for future consideration the remaining question in the cause, whether the sum of \$1600, stated in the defendant's answer, to be attached in his hands to satisfy a debt due, or claimed to be due, from Newman, the plaintiff's husband, by process of foreign attachment, pending in the Superior Court of Chancery in the state of Virginia, at Richmond, be, or be not, justly liable to such attachment for such debt? In January, 1829, the Court of Chancery at Richmond, made a decree in favour of the plaintiff in the foreign attachment, above referred to, directing Chevallie, executor of Gallego, to pay him the whole amount of his claim out of the legacy to Mrs. Newman, thus affirming, as it seems, that a creditor of the husband *may* subject a legacy to the wife to the payment of his debt, before it has been reduced into possession by the husband. The chancellor seems, too, not to have regarded the act of relinquishment of Newman, the husband, as of any validity. At the May Term of this Court, 1829, (present MARSHALL, C. J., and HAY, J.,) the cause was finally disposed of, and a decree was rendered, which, after reciting the above decree of the chancellor in the state court, and that the plaintiff had admitted by her counsel that she had received the whole amount of her legacy, except the portion which had been attached in the hands of the executor, directed the plaintiff to dismiss her bill, which was done accordingly.—[*Editor.*]

# **Circuit Court of the United States.**

VIRGINIA, MAY TERM, 1827.

BEFORE

Hon. JOHN MARSHALL, Chief Justice of the United States.

Hon. GEORGE HAY, District Judge.

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## **SWAN V. THE BANK OF THE UNITED STATES ET AL.**

W. obtained a loan from the Bank of the U. S., with S. as his endorser. The note was subsequently endorsed by H., for whose indemnity for any loss which might accrue to him in consequence thereof, W., the drawer, executed a deed of trust. W. afterwards executed other deeds of trust on the same land for the security of other creditors, and, among others, of V. The deed for the benefit of H., was not recorded, but full notice of its execution was given to V. Before the deed to V. was made, he made a calculation of the amount of the prior liens, and said that the property was sufficient to pay them, and secure him. The land was sold, subject to the prior liens, for the payment of V.'s debt. V. bid the amount of his debt, and the property was struck out to him. V. afterwards died, and his executors proposed to the Bank to pay the note on which S. was endorser, on condition that the Bank would institute suit against S. for their benefit, to which terms the Bank acceded, and obtained a judgment against S. S. filed his bill, stating these circumstances of which he had no knowledge until the judgment was obtained, as he averred, and prayed an injunction, which was granted. The injunction was made perpetual.

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Swan v. The Bank of the United States.

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THE case is fully stated in the opinion of the Court, delivered as follows, by

MARSHALL, C. J.—Blake B. Woodson had obtained a loan from the Bank of the United States on his note, with John T. Swan, the plaintiff, as his endorser. After some time, an additional endorser was required by the Bank, whereupon Walthal Holcombe agreed to add his name to that of Swan, upon which, the accommodation was continued. In October, 1818, Blake B. Woodson executed a deed conveying a tract of land in the county of Cumberland, to Benoni Overstreet, in trust, that “if the said Walthal Holcombe shall be likely to suffer on account of the undertaking of the said Walthal Holcombe, for the said Blake B. Woodson, at the Bank aforesaid, in the opinion of the said Benoni Overstreet, or in the case the note in the said Bank now, or hereafter, with the name of the said Walthal Holcombe as endorser thereon for the said Blake B. Woodson, shall be protested, whereby the said Walthal Holcombe, his heirs, &c., shall in the opinion of the said Benoni Overstreet, be likely to suffer for the amount of any such protest, costs, and charges, or any part thereof, the said Benoni Overstreet at the request of the said Walthal Holcombe, shall” on thirty days notice, proceed to sell the trust premises.

Blake B. Woodson executed other deeds of trust on the same land for the security of other creditors, and among others, for the security of Samuel W. Venable, under whose deed the land was sold, and the said Venable became the purchaser thereof.

The deed to Benoni Overstreet for the benefit of Holcombe, was not recorded, but full notice of it was given to Samuel W. Venable. At, and before the sale, it was shown to him by Benoni Overstreet, the trustee. After he had read it, the said Overstreet observed that it was not recorded, on which Venable admitted its validity as to him. Before the deed to secure Venable was executed, he had a conversation with Edward Bedford respecting the affairs of Blake B. Woodson, in which Bedford informed him of the several liens on Woodson’s land,

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*Swan v. The Bank of the United States.*

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including that for the security of Holcombe, on which Venable made a calculation of their amount, and said that the land would be sufficient to discharge those liens and pay the debts due to him. The deed for his benefit was executed soon afterwards. When the conversation took place between Venable and Overstreet at the sale, they again made a calculation of the liens which were found to amount, including the debt due to the Bank, to about \$9000. The land was sold for the payment of the debt due to Venable, subject to the prior liens, among which, the debt due to the Bank was mentioned, and Venable bid the amount of his own debt, and being the highest bidder, the land was struck out to him.

A higher price had been offered for the land and rejected by Blake B. Woodson. This offer was repeated during the bidding, and again rejected, about which time the land was struck out to Samuel W. Venable.

The accommodation to Blake B. Woodson, with John T. Swan, and W. Holcombe as endorers, was continued by the Bank, and before any change took place in the debt, Samuel W. Venable died, leaving N. E. Venable and A. W. Venable his executors. They proposed to the Bank to pay the debt, provided the Bank would put the note in suit against John T. Swan, for their benefit. This proposition was acceded to, and a judgment obtained in the name of the Bank against John T. Swan. Swan filed his bill, stating the foregoing circumstances, alleging his ignorance of these transactions, until after the judgment was rendered, and praying an injunction. The defendants, the executors of Samuel W. Venable, admit their liability to W. Holcombe, but insist that the lien of Holcombe, as he has not been compelled to pay anything, and is now discharged from all responsibility, cannot be set up by the plaintiff.

It is perfectly clear, that Holcombe, as a subsequent endorser, having made no arrangement whatever with Swan, the previous endorser, which connected them in any manner with each other, would not have been responsible to Swan, for any portion of the debt paid by that endorser, but would have had recourse

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*Swan v. The Bank of the United States.*

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against Swan, to be indemnified for any sum he might be compelled to pay. It must be admitted, that the deed of trust was intended solely as an indemnity to Holcombe, and was not executed for the benefit of Swan. If Swan can now avail himself of it, his right to do so grows out of subsequent transactions.

In considering this case, the first inquiry that presents itself to the mind is, could Swan, in the event of being compelled to pay the debt to the Bank, before the sale of the trust property, have resorted to that property for indemnity? By force of the mere terms of the deed, he undoubtedly could not; but would a court of equity have given its aid?

The property, after Holcombe was discharged from his endorsement, would have reverted to Woodson, and the trustees would have been seized in trust for him. Consequently, any creditor might have pursued it; and a court of equity would, if necessary, at least have removed the trust out of the way. But when the land became charged with subsequent deeds of trust, the creditors for whose benefit those deeds were made, would not be postponed to that made for Holcombe, farther than was necessary to satisfy the terms of that deed. Consequently, Swan, had he in that state of things been compelled to pay the debt to the Bank, could have had no pretext for claiming the aid of Holcombe's deed against the holder of any subsequent deed, or against any purchaser at a sale made in pursuance of such deed. If his case is mended, it is by the facts attending the sale, and the discharge of the note in Bank, as disclosed by the testimony.

It is proved, that when Mr. Venable obtained the deed of trust, he valued the property at a sum sufficient to discharge the debt due to himself, after discharging all prior incumbrances, including that of Holcombe. It is also proved, that this computation was again made at the sale, and that the land was at that time thought a good purchase, supposing it to be charged, not contingently, but positively, with the debt to the Bank. These facts show, that in the mind of Mr. Venable himself, the debt due to the Bank constituted a part of the purchase-money; and



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would probably have afforded strong inducements to any creditor, acting solely under the influence of his own feelings, and with the single desire of obtaining his debt, to press Mr. Holcombe, who was secured, rather than Mr. Swan, who could revert to no fund for reimbursement. Had the creditor pursued this course, the land purchased by Mr. Venable would have been subjected to the debt, and it will not be alleged that he could have had any recourse, in law or equity, against Mr. Swan as the prior endorser. Had the land still retained the value at which it was estimated when sold, all will admit that that is the course which, in right and justice, the affair ought to take.

But, although the fact is not alleged in the record, the reduced price of property, real as well as personal, is a matter of general notoriety, and will certainly justify the defendants in avoiding the payment of this debt, if the law will enable them to do so. Had the Bank, without their interposition, proceeded of itself, to coerce payment from Mr. Swan, he could not, perhaps, have obtained the aid of a court of equity. Had the representatives of Mr. Venable remained passive spectators of the procedure, it is probable that the circumstances attending the purchase made by their testator, would not have affected the estate. But they have not remained passive spectators. The Bank has acted at their instigation, and by their procurement. They have been the means of inducing the Bank to proceed against a surety having no indemnity, rather than against one holding an indemnity from the original creditor. Although this might have been perfectly justifiable in a court of equity, if disconnected from the circumstances attending the taking of the trust-deed, and the sale of the property under that deed, it cannot be sustained when viewed in connexion with those circumstances.

An additional argument, which has been suggested by my brother judge, is entitled to great weight. It is, that if Mr. Venable may coerce the payment of this money from Swan by using the name of the Bank, he gives Swan an action against

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Swan v. The Bank of the United States.

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Woodson, and thus renders Woodson liable for the money which his land was intended to secure.

The injunction is made perpetual.

NOTE BY THE EDITOR.—From the decree perpetuating the injunction in this cause, the defendants, executors of Samuel W. Venable, appealed to the Supreme Court of the United States. At the January Term of the Supreme Court, 1830, on motion of Mr. *Wirt*, of counsel for the appellee, Swan, the cause was docketed and the appeal dismissed, “the appellants having failed to lodge a transcript of the record in the said cause with the clerk of this Court, agreeably to the rules of” the Supreme Court. 3 Peters, 68.

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DAVIS V. PALMER and THE SAME V. M'CORMICK.

Before Hon. JOHN MARSHALL, Chief Justice of the United States.  
Hon. GEORGE HAY, District Judge.

An inventor obtained a patent for certain improvements made in the construction of the plough, and brought suit for an alleged violation of his patent-rights. In the description of those improvements which is annexed to, and made a part of the patent, after reference to the imperfections of the mould-boards formerly in use, the specification proceeds: “In order to meet and remedy the inconveniences arising from this form of structure, I form my mould-board into a different shape, and instead of working the moulding part or face of the mould-board to *straight lines*, my improvement is to work it to *circular or spheric lines*. By repeated experiments, I have ascertained that in one direction, viz.: from *a*, fig. 4, (the point of the share) inclining to the back part of the mould-board, the circle or segment to which the mould-board is wrought, should have *about* three times the radius of the smaller segments, represented by the letters *c, c*, &c., the former being about thirty-six inches, the latter twelve.” After a detailed description of

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Davis v. Palmer, and The Same v. M'Cormick.

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the new mould-board, the specification proceeds: "This being thus worked off, uniformly forms a *section of a loxodromic or spiral curve*, and when applied to practice, is found to fit or embrace every part of the furrow-slice far more than any other shaped plough, &c." *Held:*

1. That this patent must be construed, not as extending to all mould-boards whose faces are *worked to circular or spheric lines, forming a segment of a loxodromic or spiral curve*, (which general description would apply to mould-boards already in use, and under that construction the patent would, consequently, be void,) but as applying only to mould-boards whose faces are worked upon transverse circular lines, whose radii are in the *exact* proportion of thirty-six to twelve. The word "about" must be rejected for uncertainty.
2. That it is the province of the Court to construe the patent and determine what improvements are intended to be patented, and of the jury to decide whether those improvements are described in the patent with sufficient clearness to enable a skilful mechanic to construct a machine thereby. In deciding this question, the jury should give a liberal common sense construction to the directions contained in the specification.
3. That so much of the patent as relates to the face of the mould-board, is not violated, unless the same circular lines are adopted as are described in the specification, but if the imitation be so nearly exact as to satisfy the jury that the imitator intended to copy the model, and to make some almost imperceptible variation for the purpose of evading the right of the patentee, this may be considered as a fraud on the law, and such slight variation be disregarded.
4. That a particular description of the mould-boards formerly in use, is not necessary to give validity to the patent; a reference to them in general terms, which are not untrue, or a reference to a particular mould-board generally known, accompanied by such an intelligible description of what is new, as will enable a workman to distinguish it from the old, is sufficient.
5. That although the act of Congress declares, "that *simply* changing the form or proportion of any machine, shall not be deemed a discovery," yet, when the change of form or proportion produces a new effect, of which the jury must judge, it is not *simply* a change of form or proportion, and does not come within the inhibition of the statute.

THE plaintiff, Gideon Davis, brought his several actions on the case against the defendants, to recover treble damages under the statute, for an alleged violation of the plaintiff's patent-rights, as the inventor of certain new and valuable improvements in the plough.(1) The declarations, which are identical,

(1) See the act of Congress "to extend the privilege of obtaining patents, and to enlarge and define the penalties for violating the rights of patentees," sec. 3, passed 17th of April, 1800. Story's L. U. S., Vol. I, p. 753.—[Editor.]

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contained various counts. The first count charged the defendants with having *made and sold* divers improved ploughs *upon the said improved plan, and in imitation of the said invention* of the plaintiff.

The second count charged, that the defendants had *made and sold* divers ploughs, *partly* upon the said improved plan, and *partly* in imitation thereof.

The third count charged, that the defendants *did counterfeit and did use and put in practice*, the improvement and invention of the plaintiff.

The fourth count charged, that the defendants *did make* divers ploughs, *on the improved plan and in imitation of the invention* of the plaintiff.

And the fifth count charged, that the defendants *did make* divers ploughs, *partly* on the improved plan, and *partly* in imitation of the invention of the plaintiff.

On the 1st of October, 1825, letters patent were issued to the plaintiff, granting to him for the space of fourteen years, the exclusive right of constructing, &c., ploughs upon his improved plan, and to the patent was annexed a diagram and schedule, which were made a part thereof, descriptive of the improvements which the plaintiff claimed to have discovered. The specification describing the face of the mould-board of the new plough, is as follows:—"The general principle heretofore concurred in by all scientific men, who have turned their attention to this subject, is, that as the furrow-slice is detached from the solid ground, at a straight line parallel to the surface, at such depth as may be required, that it should be raised and turned over, so as to retain as far as possible the same flat shape. In order to accommodate the face of the mould-board to this idea of raising the furrow-slice up and turning it over, it has been so constructed as to form straight lines lengthwise, either horizontal or a little inclined, and also to correspond with another set of straight lines at right angles with the land-side, or nearly so, commencing at the point touching the edge of the share, and lower edge of the mould-board. These last mentioned straight

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lines, as they recede from the point of commencement, gradually change from a horizontal to a perpendicular direction, and even pass beyond the perpendicular so far as to give the proper overjet behind. It has been thought that mould-boards so constructed would fit and embrace every part of the furrow-slice in the operation of turning it over, not observing that the furrow-slice must necessarily acquire a convex form on the under side, during the operation by which it is raised up and turned over.

“The truth is, however, that in raising and turning over the furrow-slice, it always either acquires a convex form on the under side, or else it is broken off into pieces, and thrown over; as might therefore be anticipated, it will be found that all these mould-boards which are constructed on these principles, wear through in the operation of ploughing about midway, while the upper and lower edges are scarcely rubbed. It also necessarily results, that ploughs of this construction work hard, and are of heavy draught, because the mould-board, not being adapted to the convex form which the furrow-slice is disposed to assume, lifts the furrow-slice at a single point, and that in the middle, instead of being equally applied throughout the entire operation.

“In order to meet and remedy the inconveniences arising from this form of structure, I form my mould-board into a different shape; and instead of working the moulding part, or face of the mould-board to straight lines, my improvement is to work it to circular or spheric lines. By repeated experiments, I have ascertained, that in one direction, viz.: from *a*, (the point of the share) inclining to the back part of the mould-board, the circle or segment to which the mould-board is wrought, should have about three times the radius of the smaller segments, represented by the letters *c*, *c*, &c., the former being about thirty-six inches, the latter twelve. In order then, to shape the moulding part, or the face of the mould-board, having obtained a suitable block, I begin by laying off the bottom, (figs. 3 and 4,) by circular or spheric lines at *a*, *a*, *a*, *a*. If I intend to con-

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struct a plough of the proper size to cut and turn a twelve inch furrow, I strike this segment of a circle of thirty-six inches radius, (fig. 1,) and at twenty-four inches back from the point to *b*, at right angles with the land-side, this circle will intersect the angle line. This circle is extended out from the land-side. Then I work the block to fit the same segment inclined from *a*, (fig. 4,) at the point of the share to *a*, at a perpendicular raised twelve inches from the horizon, with the circle extended in towards the land-side. Then, having wrought the shape of these two lines, I apply the circular part of the smaller segment, (fig. 2) and work the face of the mould-board until that segment will have an equal bearing on all parts, corresponding with the cross-lines *c*, *c*, *c*, &c., which, if produced, would all terminate at a point at *d*, which is about thirty-six inches from the perpendicular where the line *a*, *a*, crosses the line *d*, *b*. This being thus worked off, uniformly forms a section of a loxodromic, or spiral curve, and when applied to practice, is found to fit or embrace every part of the furrow slice, far more than any other shaped plough. The plough may be made larger or smaller, suited to deep or shallow ploughing, by enlarging or diminishing the radii of the segments which it is wrought by.

“Believing that this mode of shaping the moulding part, or face of the mould-board is an original invention of my own, not heretofore used or known, and that it is a most important improvement in the shape of the plough, I claim the exclusive privilege of making, using, and vending the same.”

The defendants pleaded “not guilty,” and on the trial, moved the Court to give the jury a series of instructions, which are stated and discussed in the following opinion.

MARSHALL, C. J.—These suits are brought by the plaintiff, to recover damages for the alleged violation of his patent, for an improvement on the plough. His improvement is, in part, made on the face, throat, and hind part of the mould-board. The counsel for the defendants have moved the Court,

1. To declare the patent void, because the specification, so

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far as it regards the improvements in the mould-board, does not describe this part of the improvement with the certainty required by the act of Congress.(2)

Should the patent be submitted to the jury, they then move that it be accompanied with the following instructions;

1. That so much of the patent as respects the face of the mould-board is not violated, unless the defendants have adopted the same spheric lines as are described in the plaintiff's specification.

2. That the jury must be satisfied that the former mould-board is described with sufficient certainty, to distinguish between it and the improvement claimed.

3. If the jury shall be satisfied that M'Cormick has made and used mould-boards, worked out by transverse and concave circular lines, before the plaintiff obtained his patent, or made his alleged improvement, then the particular spheric lines described in his specification constitute only a change of form and proportion, and is not an invention capable of being patented.

In the course of the argument, the counsel have also contended that the same uncertainty exists in that part of the specification which describes the throat and hind part of the mould-board, as in that which describes its face.

1. We will first consider the proposition, that the patent is void for uncertainty.

It is, undoubtedly, the province of the Court to construe every written instrument offered in evidence; and it results from this duty, that if the instrument be so uncertain in its terms as to have no meaning; if it be insensible, or have no application to the case, it may be rejected. Is the patent, on which the present actions are founded, of this description?

The specification, No. 1, relates to the face of the mould-board. It consists, first, of a general, and then of a more particular description of this part of the improvement. The defendants contend that these descriptions are uncertain in themselves, and that there is also a fatal uncertainty which of

(2) See Act of Feb. 21, 1793, Story's Laws U. S. Vol. I, p. 301; sec. 3.—[Editor.]

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them describes the improvement for which the plaintiff claims his patent.

The plaintiff, after a general description of the mould-board then in use, and the inconveniences arising from its form, proceeds thus:—"In order to meet and remedy the inconveniences arising from this form of structure, I form my mould-board into a different shape, and, instead of working the moulding part, or face of the mould-board to straight lines, my improvement is to work it to circular or spheric lines." The specification then proceeds to a more particular description of the lines used, and of the manner in which they are applied, in order to form the face of the mould-board.

The counsel for the plaintiff seem disposed to consider this general description, as constituting the essential part of the specification, and the subsequent more particular description, as merely an illustration of the general principle, as one mode of carrying it into execution.

If the specification will admit of this construction, then the subsequent and particular description may be expunged without affecting the patent. A principle remains the same, whether it be accompanied by any case put for illustration or not. It may be comprehended more easily, but is not varied by the illustration.

If we consider this general part of the specification as standing alone, and as describing this part of the improvement, it is not liable to the charge of uncertainty. It claims, as an improvement, "to work it (the mould-board) by circular or spheric lines." Every mould-board worked by circular or spheric lines, however those lines may cross each other, and whatever may be their relative proportions, is within the plaintiff's patent. If the face of no mould-board previously in use will fit this description, the plaintiff's patent may, perhaps, legally cover the broad ground it would occupy. But if any mould-board previously in use would fit this description, then the plaintiff would claim, as his invention, that which was previously known, and his patent would be void.



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But we do not think the specification will admit of this construction. It proceeds to say, "By repeated experiments I have ascertained, that in one direction, viz: from *a*, fig. 4," (which is the point of the share) "inclining to the back part of the mould-board the circle or segment to which the mould-board is wrought, should have about three times the radius of the smaller segments represented by the letters *c*, *c*, &c., the former being about thirty-six inches, the latter twelve." This is intended for a plough which will turn a furrow-slice of twelve inches. The specification then proceeds to detail minutely the mode of operation by which these lines are to be applied, in order to give the face of the mould-board the required shape, and says: "The plough may be made larger or smaller, suited to deep or shallow ploughing by enlarging or diminishing the radii of the segments which it is wrought by."

"Believing," the specification adds, "that this mode of shaping the moulding part, or face of the mould-board, is an original invention of my own, not heretofore used or known, and that it is a most important improvement in the shape of the plough, I claim the exclusive privilege of making, using, and vending the same."

This claim applies conclusively, we think, to the particular and laboured description of the mould-board which immediately precedes it. The language seems to us to require this construction; and the subject seems also to require it. If the patent were to extend to all mould-boards worked out to circular lines, crossing each other in any direction, or in any proportion, it would be unnecessary to describe with so much labour and minuteness, the direction of the longitudinal and perpendicular circular lines, by which the face of the mould-board should be worked out, and the proportions those lines should bear to each other, and the size of the plough. It is obvious, then, that the person who makes his improvement to consist in the peculiar shape given to the face of his mould-board, and who describes the lines and their several proportions, which will give that peculiar shape, must mean to appropriate the shape produced by the ap-

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plication of those new lines. We are then decidedly of opinion, that a mould-board conforming to the particular description contained in the specification, is the invention which the plaintiff claims, and that instead of being a mere illustration of the principle stated in the introductory part of the specification, it is itself the essential improvement, of which only a general idea was given in the introductory part.

It is contended on the part of the plaintiff that, if the patent be limited to the more particular part of the specification, still the claim is not confined to mould-boards worked out by segments of circles of the exact form and proportions mentioned in the specification. To support this argument, counsel rely on the word "about," which is introduced into the description; he has found, Mr. Davis says, by repeated experiments, that the segment of the larger circle should have about three times the radius of the smaller segments, &c. The claim, therefore, is not for a mould-board of the precise shape described, but for one "about" the shape described.

It will at once be perceived, that unless the extent of this word "about," be limited, it introduces all the uncertainty which it was supposed would be fatal to the patent, according to the general description contained in the introductory part of the specification. If, instead of thirty-six inches and twelve, the proportions may be thirty-seven and eleven, thirty-eight and ten, why not forty and eight, or thirty-five and fifteen? The proportions may be enlarged or diminished, and with every change of proportion, the shape of the mould-board will be changed. If this be the construction of the patent, then it covers all the various forms of mould-boards which may be made under this latitudinous exposition of its terms; and if any mould-board has been previously used, whose face may be formed by transverse segments of circles, whose radii bear to each other "about" the proportion of thirty-six to twelve, the patent is void.

Will it be said that it may be left to the jury to determine, what is "about" the proportion particularly designated? This

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expedient will not remove the difficulty. We doubt how far it may consist with the principle that the Court is to construe every written instrument. But, waiving this doubt, if the word has any limits, they must be always the same. When applied to a mould-board, it cannot be endowed with an elastic principle, to expand or contract itself according to circumstances. It cannot admit of being varied to a certain extent, if no mould-board has been in use of the shape which that degree of variation would produce, and at the same time of being restricted, if a mould-board of such a shape has been in use. The word "about," cannot be equivalent to a general claim of the exclusive right to all concave mould-boards, varying in any degree from those previously in use. The definiteness of the shape, which the specification professes to give to the mould-board, cannot be sacrificed by this loose word. It is further observable, that where the specification describes the process of the workman, it drops the word "about."

It has been supposed that the precise proportion required between the radii of the larger and smaller segments of circles, may be relaxed under the concluding part of the description. After giving the mode of operation, the specification adds:—"This being thus worked off, uniformly forms a section of a loxodromic or spiral curve, and when applied to practice, is found to fit or embrace every part of the furrow-slice, far more than any other shaped plough."

The argument is, that it is a mould-board whose face forms a section of a loxodromic or spiral curve that is patented, and that any lines which will give such a surface, are within the specification, and consequently, within the patent.

Without noticing the difficulties growing out of this construction, it is sufficient to say, that the specification does not claim the loxodromic or spiral curve as the invention, but states it as the result of the prescribed application of the transverse circular lines, the application of which, in the relative proportions prescribed, is the invention. The language of this part of the specification, tends to confirm, we think, the opinion already

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indicated, that the plaintiff intended to claim a mould-board of the precise and definite shape prescribed, not one about that shape. He says his mould-board, "so worked off," "when applied to practice, is found to fit or embrace every part of the furrow-slice, far more than any other shaped plough."

In construing this specification, we must keep in view the notice of the improvement which Mr. Davis claims to have invented and to describe. It is an improvement in the shape of a machine which has been in common use a great number of years, and in a great variety of shapes. The concave mould-board has been long considered as the most eligible shape that part of the plough can assume, and multiplied essays have been made to perfect it. Mr. Davis has recently added to their number; he professes to have discovered that precise concavity in the surface of the mould-board, which will better than any other fit every part of the furrow-slice, and, consequently, turn it over with less labour. For this discovery he claims a patent; we may reasonably expect, that a specification for such a patent, will give a precise and definite shape to the improvement to be patented.

We are then decidedly of opinion, that in construing this specification, the word "about" must be disregarded, and the patent be restricted to the mould-board as described, independent of that word.

If we consider the particular part of the specification as describing the object to be patented, the defendants insist that the description given in that part is not sufficiently clear to enable a skilful mechanic to construct the machine.

It may not, perhaps, be easy to draw a precise line of distinction between a specification so uncertain, as to claim no particular improvement, and a specification so uncertain as not to enable a skilful workman to understand the improvement, and to construct it. Yet, we think, the distinction exists. If it does, it is within the province of the jury to decide, whether a skilful workman can carry into execution the plan of the inventor. In

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deciding this question, the jury will give a liberal common sense construction to the directions contained in the specification.(3)

If the patent be submitted to the jury, the defendants request the Court to give the several instructions which have been already mentioned.

1. The first is, that so much of the patent as relates to the face of the mould-board is not violated, unless the defendants have adopted the same circular lines as are described in the specification.

This instruction will be given. But it may perhaps be understood with some slight modification. The patent, undoubtedly, covers only the improvement precisely described. But if the imitation be so nearly exact as to satisfy the jury that the imitator attempted to copy the model, and to make some almost imperceptible variation, for the purpose of evading the right of the patentee, this may be considered as a fraud on the law, and such slight variation be disregarded.

2. The second instruction is, that the jury must be satisfied that the former mould-board is described with sufficient certainty, to distinguish between it and the improvement claimed.

We do not think a particular description of the former mould-board is necessary. A general reference to it, either in general terms which are not untrue, or by reference to a particular mould-board, commonly known, accompanied by such a description of the improvement as will enable a workman to distinguish what is new, will be sufficient.

3. The Court is also requested to instruct the jury that, if McCormick has made and used mould-boards, worked out by transverse circular lines, so as to produce a concave surface, before the plaintiff obtained his patent, or made his alleged improvement, then the particular lines described in his specification, constitute only a change of form and proportion, not an invention capable of being patented.

(3) See the able opinions of Mr. Justice Story, in *Ames v. Howard et al.*, reported in 1 Sumner's Rep. 482, and of Mr. Justice Baldwin, in *Whitney et al. v. Emmett et al.* 1 Baldwin's Rep. 303.—[Editor.]

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It is stated on both sides, that the clause in the statute, to which this instruction refers, is one of considerable doubt. It is in these words: "And it is hereby enacted and declared, that simply changing the form or the proportion of any machine, shall not be deemed a discovery."(4)

In construing this provision, the word "simply," has, we think, great influence. It is not every change of form and proportion which is declared to be no discovery, but that which is *simply* a change of form or proportion, and nothing more. If, by changing the form and proportion, a new effect is produced, there is not simply a change of form and proportion, but a change of principle also.

In every case, therefore, the question must be submitted to the jury, whether the change of form and proportion, has produced a different effect.

With respect to the throat and hind part of the mould-board, the Court need only say, that the description of the specification is general, not giving the particular shape of those parts of the mould-board. If either the throat or hind part of a mould-board, was in use before, which answers the description contained in this specification, then the plaintiff has patented what belonged to the public, and his patent is void.

NOTE.—After the opinion of the Court was delivered, both suits were dismissed agreed; each party paying his own costs.

(4) Act, 1793, before referred to. Story's Laws U. S. Vol. I, p. 301; sec. 2.—  
[Editor.]

## Circuit Court of the United States.

VIRGINIA, MAY TERM, 1828.

REPORT

HON. JOHN MARSHALL, Chief Justice of the United States.

WRIGHT and COOKE v. STANARD.

The Statute of Frauds, avoids all covinous conveyances, made with intent to delay, hinder, or defraud creditors, but does not extend to conveyances made on valuable consideration, and in good faith: therefore, where husband and wife, made a conveyance of land to trustees, for the use and benefit of the wife, in consideration of the wife's relinquishing her right of dower in other lands, for the payment of her husband's debts, although the value of the right of dower, is only about a third of the value of the land conveyed for her benefit, yet such conveyance is not absolutely void, but, in a court of law, must be adjudged to be valid. Mere inadequacy of price may be so great, as to be evidence of fraud, proper to be submitted to a jury; but is not in itself a fraud, on which a court of law will pronounce a deed to be absolutely void.

Although a court of equity would consider the deed before described, as being held in trust for the wife, only to the value of the dower she has released, and for the creditor, as to the residue: yet in a court of law, the deed cannot be sustained in part, and avoided in part, but will be considered as entirely good.

W. & C., obtained a judgment at law against K., in December, 1824, and sued out an elegit in November, 1825; meanwhile, that is, in March, 1825, M., R. &

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G., other creditors of K., obtained a decree from the court of chancery, directing a sale of land which had been conveyed by K. to trustees, for the benefit of his wife, (made *bona fide*, and for valuable, though inadequate, consideration,) and that out of the proceeds of the sale, the trustees for the wife, should first be paid the amount of the consideration which had actually passed from the wife, and then the residue to be applied to the extinguishment of the debt of the said M., R. & G. *Held*: That the judgment-creditors, W. & C., (who had their elegit executed whilst the sale was being made under the decree,) cannot recover the land in ejectment against the purchaser under the decree.

THIS case is fully stated in the following opinion, given by the Chief Justice, on the 22d day of May, 1828 :

MARSHALL, C. J.—This cause comes on upon a special verdict, found in an ejectment brought to obtain possession of a lot in the city of Richmond, which was taken by virtue of a writ of elegit issued on a judgment of this Court. The ejectment being the prescribed mode for obtaining actual possession in such a case, the question is, was this lot subject to the writ when it was executed ?

The judgment was rendered in favour of the plaintiffs, against John King, on the 18th day of December, in the year 1824. The writ of elegit, issued on the 14th of November, 1825. The special verdict finds, that John King was seized in fee of the lot on which the inquisition was taken, on the 30th of September, 1819, on which day he conveyed a part of the premises to John Gibson and John M'Crea, in trust for the security of a debt in the deed mentioned. On the 9th of October, he conveyed the residue of the premises to the same trustees also, for the benefit of a creditor in that deed mentioned.

The debt secured by the deed of September, 1819, was payable by instalments, the last of which fell due on the 16th day of January, 1822, and the deed stipulated that the said King, should retain the possession and receive the profits, until default should be made in the last payment.

The debt secured by the deed of October, was also payable by instalments, the last of which fell due on the 24th day of January, 1825, and the trustees were to sell, if on that day any



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part of the debt should remain unpaid. The interest of the said John King, so far as it was a present interest, was unquestionably subject to an elegit. It remains, then, to inquire, whether this interest has been so transferred, as to be placed out of the reach of that writ.

On the 22d of March, 1820, John King, and Helen S. King, his wife, in pursuance of an agreement to make a reasonable provision of the dower of the said Helen S., which is recited in the deeds, conveyed the dower-right of the said Helen S. to certain real estate, which had been previously conveyed by the said John King, in trust for certain creditors in the said deeds mentioned.

On the 30th of March, 1820, John King, conveyed certain real property, including the premises in the declaration mentioned, to Peter V. Daniel and James Rawlings, in trust for his said wife. This deed professes to be made in consideration of the agreement recited in the deed of the 22d of the same month, and after its execution, the trustees received the rents of the said tenement for the benefit of the said Helen S. The jury find, that at the date of this deed, John King was greatly embarrassed in his circumstances, and had conveyed a great part of his property in trust for his creditors. They also find, that the dower-right conveyed in the deed of the 22d of March, was worth \$1016 67, and that the dower-right of the said Helen S., in other property conveyed by her husband, but not by herself, was worth \$1777; and that the property conveyed by the deed of the 30th of March, in satisfaction of dower released by the deed of the 22d of March, was worth \$3040.

The defendant claims under a sale made in pursuance of an interlocutory decree of the court of chancery for the state, which was pronounced on the 26th day of March, 1825, in a suit brought by Mollin, Rankin, & Gallop, creditors of the said King, to set aside the deed of the 30th of March, 1820, as being fraudulent as to creditors.

The plaintiffs were not parties to this suit, and, consequently, are not bound by the decree. They have therefore a right to

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re-examine the validity of the deed, which was the subject of that decree. Having obtained their judgment before the decree was pronounced, and having issued their writ of elegit while that judgment was in force, the decree, however correct in its principles, must leave the property subject to the lien, if any, which was created by the judgment.

If the deed of the 30th of March, 1820, was absolutely void, then the interest which the deed of the 22d of the same month left in John King, was liable to his creditors, and was bound by the plaintiff's judgment. If that deed was valid, no interest remained in John King, other than an equity of redemption. The dower relinquished by Mrs. King constituted, certainly, a valid consideration for a deed which should settle on her a fair equivalent for that right. But the dower which she relinquished was worth but little more than one-third of the property conveyed to her as that equivalent. A court of chancery may, very properly, and does consider such a deed, as being held in trust for the wife, to the value of the dower she has released, and for the creditors as to the residue. But how is such a deed treated in a court of common law?

At law, the deed cannot be sustained in part only, but must be entirely good or entirely void.

The statute of frauds avoids all covinuous conveyances made with the intent to delay, hinder, or defraud creditors, but does not extend to conveyances which are made on good consideration and in good faith. It has been already said, that the dower released by Mrs. King under an agreement to make an adequate settlement on her, was a good consideration, in the sense in which those words are used in the act, and I can find no case in which a court of law has ever held a deed of settlement on a wife to be absolutely void, because the estate conveyed was worth more than the price for which it was conveyed. Mere inadequacy of price may be so great as to be evidence of fraud, to be submitted to a jury, but has never been determined to be, in itself, a fraud for which a court will pronounce a deed to be absolutely void. In this case, the jury have not found fraud.

There is no secret trust for the benefit of the husband. On the contrary, the trustees were put in possession of the property, and received the profits for the separate use of the wife.

The plaintiffs contend, that though the jury have not found fraud, they have found facts which amount to fraud, and have submitted the question to the Court, whether upon those facts the law be for the plaintiffs?

Without affirming or denying, that a verdict may present a case to the Court which, though it does not contain a specific finding, that the deed is covinous or fraudulent, or made to deceive or delay creditors, may contain such equivalent matter as will, in point of law, show the deed to be void, I will hazard the opinion, that mere evidence of fraud, circumstances which may or may not accompany covin, do not constitute such a case. The Court will consider those circumstances on which the plaintiffs rely, as amounting, in themselves, to a fraud.

1. The first is, the difference between the value of the dower which has been relinquished, and the property which has been settled in compensation for that dower.

The Court has already said, that this difference, if the conveyance be made with a real intent to pass the property, does not, of itself, vitiate the deed in a Court of law. If the value of the dower had been a few dollars or cents less than the value of the property conveyed in satisfaction of it, no person would suppose the deed to be a nullity on that account. And if a small difference of value would not avoid it, what is the difference that will? Where does the law stop? The difference may be so great as to satisfy the conscience of the jury, that the conveyance is intended to cover the property from the just claims of creditors; but as a mere question of law, I can find nothing in the books which will justify a court in saying, that a deed, otherwise unexceptionable, is void, because the consideration is of less value than the property conveyed.

2. The other circumstance on which the plaintiffs rely is, that the deed of the 30th of March, conveys all the property of John King, which property still remained in his possession. The

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verdict finds the deed ; but does not find that it comprehended all his property. On this subject the jury say : " We find that at the date of the deed last mentioned, the said King was greatly embarrassed in his circumstances ; and the greater part of his property was conveyed by deeds of trust, to secure the debts in those deeds specified." This finding, certainly does not show that the whole of his property was comprehended in the deed of the 30th of March, 1820. The jury find a subsequent deed, dated on the 24th of May, in the same year, which purports to convey other property to trustees for his creditors. The deed of the 30th of March, certainly stipulates for the surplus money arising from his property, which was conveyed in trust ; but only the greater part of his property was so conveyed.

Neither does the verdict show that King retained possession of the property. The deed itself does not stipulate for his retaining possession, and it authorizes the trustees to receive the rents for the separate use of his wife. It authorizes her residence in any tenement which she might elect, which was not rented out, but this is not a stipulation for the possession even of that tenement, much less of the whole property by the husband. The verdict does not show that this privilege was ever exercised, or could have been exercised.

It appears to me, that the deed of the 30th of March, 1820, was valid at law, and conveyed the interest which was left in the said John King, by the deed of the 30th of September, 1819.

It remains to inquire, how far the proceedings in chancery can effect this cause.

The court of chancery sustained the deed to the extent of the consideration which moved from Mrs. King, but no farther ; and directed the property to be sold and the residue of the money to be paid to the creditor, at whose suit the sale was decreed. The plaintiffs in this cause, were not parties to that suit, and were, consequently, not bound by the decree ; but if they would avail themselves of it, they must admit its validity. They cannot take a part, and reject a part of it.

The decree ascertains the value of the dower-right of Mrs.

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King, and limits her claim under the deed to that value, which amount was received before the service of the elegit.

The sale under the decree was made while the marshal of this Court was taking the inquisition for the extent of the lot, and the chancellor has directed a conveyance to be made to the purchaser.

The counsel for the plaintiffs has taken several exceptions to the proceedings in chancery, which would be considered, if the verdict showed a title at law in the plaintiffs, independent of the decree of the court of chancery. But the verdict, I think, does not show such a title, and I do not think that this is a case in which the decree can be taken in part, and rejected in part.

I am therefore of opinion, that the law on this special verdict is for the defendant.

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### THE UNITED STATES V. MOORE'S ADMINISTRATOR.

Before Hon. JOHN MARSHALL, Chief Justice of the United States.

Hon. PHILIP P. BARBOUR, District Judge.

A marshal is liable, upon his official bond, for the failure of his deputy to serve original process; but the measure of his liability, is the extent of the injury received by the plaintiff, produced by such negligence. If the loss of the debt, be the *direct legal consequence* of the failure to serve the process, the amount of the debt is the measure of damages; but the mere failure to execute the process, does not, in itself, necessarily infer the loss of the debt to the plaintiff, by the negligence of the officer, because, the plaintiff might sue out other process, on the failure of the officer to execute the first process. The question, whether the loss of the debt was, or was not, the direct legal consequence of the negligence of the officer, is a question of fact, depending on circumstances, of which the jury must judge.

Where a writ of *capias ad respondendum*, comes to the hands of a deputy-marshal who arrests the debtor, and the debtor thereupon, pays to the deputy the amount

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of the debt for which he was sued, and the officer discharges the debtor from custody, and returns the writ, "debt and costs satisfied," this is not an official act which binds his principal. The deputy-marshal is a mere ministerial officer, and he has no right to adjust the debt, and make himself responsible to the plaintiff. He is bound to pursue the mandate of the writ, and that requires him to arrest the debtor, and take bail. The discharge of the debtor from custody, without taking bail, is, indeed, a misfeasance in office, for which his principal, the marshal, is responsible; but he is only responsible to the extent of the injury done to the plaintiff. The return of the deputy, shows that no bail was taken, and if, by taking out other process, the plaintiff could have secured his debt—which is a fact to be determined by the jury—the loss of the debt to the plaintiff, is not the necessary legal consequence of the conduct of the deputy, and no injury, in a legal sense, is done to the plaintiff thereby.

THIS was an action of debt, brought upon an official bond, executed by the defendant's intestate, Andrew Moore. The bond was executed in 1815, in the penalty of \$20,000, and the condition of the bond was, that the principal obligor, Andrew Moore, should faithfully discharge the duties of marshal of the district of Virginia. This suit was brought in June, 1825. The declaration claimed the penalty of the bond, and the defendant pleaded, conditions performed. The plaintiffs filed their replication, assigning several breaches of the condition of the bond, viz:

1. That on the 16th day of May, 1816, an execution in favour of the United States, was issued from the District Court of the United States, held at Norfolk, upon a judgment rendered against John H. Fawn, for \$1548 85, with interest from the 14th day of January, 1816, directed to the marshal of the Virginia district, which came to the hands of William P. Foster, the duly qualified deputy of Andrew Moore, and that by virtue thereof, the amount of the execution was levied, and recovered by the said deputy, for which he had failed to account to the United States.

2. That on the 18th day of May, 1816, a writ of *capias ad respondendum* was issued against Goodnow & Wales, debtors of the United States, at the suit of the United States, for the sum of \$922 95, with interest from the 11th day of May, 1816,

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directed to the marshal of the Virginia district; and on the 2d day of July, another writ of *capias ad respondendum* was issued against Thomas Powell, also a debtor of the United States, at the suit of the United States, for the sum of \$185 36 with interest from the 19th of June, 1816, also directed to the marshal of the Virginia district, which writs were issued from the clerk's office of the same court, and at the dates of their emanation respectively, came to the hands of the said William P. Foster, the deputy of Andrew Moore; but the deputy utterly neglected to execute, or make due return on either writ, whereby the United States was prevented from recovering judgments against each of their debtors, and the debts were wholly lost to them.

3. That the debts mentioned in the second breach being due to the United States, and the writs having been issued and come to the hands of the said deputy, as therein set forth, the deputy arrested the debtors by virtue thereof, who thereupon respectively paid to him the full amount of their debts, and the deputy forthwith discharged the defendants from arrest, and wilfully failed to make due return of the said arrests or either of them, or to account for, and pay the amounts so levied to the United States, whereby the United States was prevented from obtaining judgments against their debtors, and the debts were wholly lost to the plaintiffs.

4. That the money mentioned in the first breach, having been levied; and the writs mentioned in the second breach having issued, and come to the hands of the said deputy, and the amount of the debts mentioned in the third breach having been received by the deputy, as therein set forth, respectively; on the 16th of November, 1819, on the motion of the United States, by their attorney, the said District Court of the United States, held at Norfolk, adjudged, that Andrew Moore was liable for the three debts above recited, and that an attachment should issue against him for his failure to pay them; and the plaintiffs averred that the said judgment and the attachment it awarded, had not, in any manner been discharged or satisfied, and that the debts remained wholly unpaid.

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At the May Term of this Court, 1828, the jury found the following special verdict, assessing contingent damages: "We find for the plaintiffs on the first breach assigned, and assess their damages to the value of \$1548 85, with interest thereon, from the 14th of January, 1816, till paid.

"And we find for the plaintiffs on the second breach assigned, and assess their damages, by reason of that breach, to the value of \$1108 21, with interest on \$922 95, from the 11th of May, 1816, and interest on \$185 36, from the 9th of June, 1816, till paid.

"And we find for the plaintiffs on the third breach assigned, and assess their damages, by reason of that breach, to the same amount and interest assessed on the second breach.

"And we find for the plaintiffs on the fourth breach assigned, and assess their damages, by reason of that breach, to the value of \$2657 06, with interest on \$1548 85, part thereof from the 14th of January, 1816, and on \$922 95, another part thereof, from the 11th of May, 1816, and on \$185 36, the residue thereof, from the 9th of June, 1816, till paid.

"And if the Court shall render judgment for the plaintiffs on the fourth breach assigned, then we find for the defendant on the other breaches; and if the Court shall be of opinion that the plaintiffs are not entitled to judgment on our finding on that breach, and shall be of opinion that they are entitled to recover on either the second or third breach, then we find for the defendant on that one of the said second or third breaches, on which judgment shall not be entered, so that, in any event, the total amount of damages assessed against the defendant, on all the breaches for which judgment is to be rendered, shall not exceed the amount above assessed on the fourth breach."

Chief Justice Marshall delivered the following opinion of the Court, (present, MARSHALL, C. J. and P. P. BARBOUR, J.,) on the above verdict, and the case stated by the parties, which is set forth in the opinion itself.

MARSHALL, C. J.—This is an action of debt brought upon the official bond of the marshal of this district, the intestate of the



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defendant, upon which the jury have found a verdict which assesses contingent damages, dependent on a case stated by the parties. This case is so stated, as to require the Court to take into view the instructions which would have been given to the jury at the trial, had instructions been asked.

The first breach assigned in the replication is, that the moneys were received by the deputy of the marshal for the United States, on executions placed in his hands, which money has never been paid over. On this breach no controversy arises.

The second breach assigned is, that two writs of *capias ad respondendum* were issued against debtors of the United States, which were placed in the hands of the same deputy, who neglected them or either of them, or to return them or either of them,—“Whereby, the United States were prevented from recovering judgment against each of the said debtors, and each of them have been, and are, totally lost to the said United States.” Damages are assessed to the amount of these two debts.

The case stated, is that two writs of *capias ad respondendum*, against two several debtors of the United States, were placed in the hands of the deputy, who, instead of executing them, received the sums due from the several defendants, and made return thereof on the writs, after which the suits were dismissed. The United States have never received this money, and they now claim it from the estate of the marshal.

In this second assignment of breaches, the receipt of the money is not brought into view. The neglect of duty in not serving the process, is the fault alleged to have been committed by the officer; and for this neglect his principal is unquestionably liable. But what is the extent of his liability?

But one general answer can be given to the question. As in all other instances of neglect, he is liable to the extent of the injury produced thereby. This to be ascertained by jury. The replication alleges that the debt has been lost thereby: and if this fact be as alleged, the amount of the debt is the measure of damages. But this is a subject for the consideration of the jury. It was not submitted to the jury, and has been transferred

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to the Court. If the loss of the debt was the direct and legal consequence of this neglect, the verdict ought to stand ; but if this be a subject on which the judgment of the jury, under the instruction of the Court ought to be exercised, then it would be improper in the Court to decide upon it until that judgment is exercised. It is too obvious to require discussion, that the loss of a debt is not the necessary consequence of neglecting to serve the first process which comes to the hands of the officer. The law provides for new process ; and the question, whether that new process may not be as available to the plaintiff as the original process, depends on circumstances, of which the jury must judge.

If, in this case, the plaintiff has been prevented from issuing new process by the act of the officer, that is not alleged in this part of the replication. If it may be given in evidence on this real assignment, then we must look in the act which is alleged to have arrested further proceedings. That act is the receipt of the money due to the United States.

If the officer was not authorized to receive this money, his receipt of it could not bind the United States, nor prevent further proceedings according to law. If he was authorized to receive it, the defendant will admit that the plaintiff could proceed no farther ; and that the loss of the debt is the consequence of not serving the process, and receiving the money. This question will be properly considered, under the third breach assigned in the replication.

3. The third breach is, that the officer did arrest the said debtor, as commanded by the said process, who, thereupon, respectively paid to the said deputy, the full amounts of their respective debts aforesaid ; and in consideration thereof, the said deputy did then and there discharge the said debtors from the arrests aforesaid, and wilfully failed to make due return of the said arrests, or either of them, or to account for and pay the amounts so received from said debtors, or any part thereof, to the said United States, whereby the said United States was prevented from obtaining judgments against their said debtors for

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their said debts, and the said debts were, and are wholly lost to the said United States.

To support this breach, it would be necessary to show, in the first place, that the debtors were arrested.

This is not proved; but may, and perhaps ought to be, assumed by the jury, from the facts admitted in the case. The material inquiry, then, presents itself: Was the receipt of the money an official act? Was it authorized by the mandate of the writ?

We are decidedly of opinion that it was not. The mandate of the writ was to take the person of the defendants mentioned therein, and to have them before the Court, to answer the United States in a plea of debt, &c. A controversy exists between the parties, which is to be adjusted, not by the officer, but by the Court. His duty is ministerial, not judicial. It is to bring the debtor into Court to receive its judgment, not to render that judgment.

The sum actually due, is, generally, less than that demanded in the writ, and in these cases, it was considerably less. The officer does not know officially the real amount of the debt, and, consequently, cannot adjust it and receive the money. If he is not authorized to ascertain the sum due, and to receive that sum, neither is he authorized to receive the whole sum mentioned in the writ, and to discharge the persons arrested. His duty is prescribed by the words of the writ; he is to obey its mandate. It would be time misapplied to enter into a consideration of the consequences of permitting the officer to depart from the mandate of the writ, and to make himself accountable to the United States, when not authorized by law so to do. It is enough to say that the writ did not authorize him to receive the money, and that its receipt was not an official act. Since the money was not received by virtue of the writ, with the authority of which the deputy was entrusted, his principal cannot be chargeable by the legal force of that receipt; if he is chargeable, it is in consequence of the official acts performed or omitted by his deputy. The act performed is, making his return,

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which is, "debt and cost satisfied." The charge in the replication, is, that upon receiving the money he discharged the debtors.

That this proceeding is a misfeasance in office, which subjects the principal to the action of the United States, is not controverted; but on this breach, as on the second, the amount of damages depend on the amount of injury. The return of the officer did not prevent the United States from taking such farther steps as is authorized by law; if the return shows service of the process, the plaintiffs might proceed against the defendants and the marshal for want of bail; if it does not show service, or if it shows a discharge, the plaintiffs might sue out a new process. The return that the debt was satisfied, did not bind the United States. The amount of injury, therefore, depends on all the circumstances, and those circumstances must be weighed by a jury.

The counsel for the United States insists, that the money received by the deputy, is the measure of damage sustained by the United States, that the deputy is responsible for the sum so received, and as he received it by colour of his office, the principal is also responsible to the same extent.

But if the receipt of this money did not stop the United States, if it was not an official act authorized by the process or by law, the loss of the debt does not appear to be a necessary consequence from the return on the writ, or the neglect to take bail.

NOTE.—After the above instructions were given, the jury found for the plaintiffs on the first breach assigned, as in the special verdict; for the defendant, on the second and fourth breaches, and for the plaintiffs on the third, assessing their damages on that breach to one cent.

## BLACK ET AL. V. SCOTT, EXECUTOR OF LESSLIE ET AL.

Before Hon. JOHN MARSHALL, Chief Justice of the United States.

The proceeds of the sale of the real estate of J. L., deceased, constituting a very large fund, being in the hands of the Federal Court, for distribution among his creditors, the executor of W. L. M., a ward of J. L., moved the court for an order that he should receive the amount of the ward's claim against J. L.'s estate, which had been established by a decree of the Court of Chancery for the state of Virginia. The fund in possession of the court being inadequate for the payment of all the debts of J. L., deceased, for which his real estate was bound, the executor of the ward claimed the whole amount of the debt due to his testator, both as a creditor by bond (the guardian having given a bond in which his heirs were bound), and by virtue of the acts of assembly of Virginia, in such cases provided.

By the law of Virginia, it is provided, that the "estate of a guardian or curator, appointed under this act, not under a specific lien, shall, after the death of such guardian or curator, be liable for whatever may be due from him or her, on account of his or her guardianship, to his or her ward, before any other debt due from him or her," (see act concerning Guardians, &c., 1 Rev. Co. ch. 108, sec. 12, p. 408), and that "the executors or administrators of a *guardian*, of a committee, or of any other person, who shall have been chargeable with, or accountable for the estate of a *ward*, an idiot, or a lunatic; or the estate of a dead person, committed to their testator or intestate, by a court of record, shall pay so much as shall be due from their testator or intestate, to the *ward*, idiot, or lunatic, or to the legatees, or persons entitled to distribution, before any proper debt of their testator or intestate." (See act concerning Wills, Intestacy, and Distributions, 1 Rev. Co. ch. 104, sec. 60, p. 389.)

The will of J. L., contained the following clauses:—"In the first place, *I desire that all my just debts may be paid*, and for this purpose, *I subject my whole estate, real and personal*. In case it should be necessary for the purpose of paying my debts, *to sell any part of my real estate, I give to my executors, after named, the power of so doing*," "and authorize my said executors, or such of them as may act, to make conveyances to the purchaser or purchasers." "All the rest and residue of my estate, after the payment of my debts and legacies as aforesaid, I give to my two children, Andrew and Jane." The devisees of the residue, were his heirs at law. *Held*: 1. That the 12th section of the law concerning guardians, &c., and the 60th section of the act concerning wills, &c., having both been passed at the same session of the legislature, and being in *pari materia*, must be considered in connexion as if they were parts of the same act; that the latter section applies only to executors and administrators, in the administration of the effects of their testator or intestate, that come to their hands in their official character,

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giving priority to debts due to a ward, an idiot, a lunatic, or the estate of a dead person, &c., over all others, but placing them all on the same footing with reference to each other.

2. That the word *estate*, in the 12th section, concerning guardians, &c., must be construed to apply *only* to the *real estate* of the guardian, for if it were applicable to the *personalty* also, it would give the ward the priority on the *personal estate*, over persons who are, by the section respecting wills, &c., expressly placed on an equal footing with him. But this act gives the priority to the debt due to the ward, to any bond debt due from the testator or intestate, on his own account.
3. But this statute does not create a *lien* on the lands of the guardian, for that would bind them in the hands of a purchaser. To give it such an interpretation, would violate the general policy of the law, in setting up a secret lien, in restraint of alienations, and is not required, either by the express words of the act, or any necessary construction of it. But
4. Although this act does not create a *lien* on the guardian's lands, it does *create* a liability of the heir, or devisee, to pay the debt due to the ward on guardianship account, in consideration, and to the amount, of the land descended or devised, and does not merely give the *preference* to an existing liability. The words in the section, "the estate of a guardian, or curator, appointed under this act, shall be liable, &c.," although the comma in the printed code, is placed after the word "curator," must be read as if it was placed after the word "guardian," so as to bind the lands of *all* guardians, and not merely "guardians appointed under this act," or statutory guardians. Thus, the debt due to the ward of a *testamentary guardian who was not required to give bond*, would as effectually bind his lands in the hands of the heir, or devisee, under this construction of the act, as of a statutory guardian who had given a bond binding his heirs.
5. The testator J. L., having, by his will, subjected his whole estate to the payment of his debts, (which was a valid devise, sanctioned both by the principles of equity, and the act for the relief of creditors, against *fraudulent devisees*;) and empowered his executors, or such of them as might act, to sell his lands, and convey to the purchaser; has converted his whole real estate into *equitable assets*, subject to the payment of all his debts equally.
6. The 12th section of the act concerning guardians, &c., before cited, having declared that "the estate of a guardian, or curator, &c., shall, &c., be liable for whatever may be due from him or her, on account of his or her guardianship, &c., ~~before~~ any other debt, &c.," although it gives priority, and creates liability, if it did not before exist, can apply only to real estate, *in a condition to be reached by other debts*. The language of the section is comparative, comparing the charge it creates with other charges, and giving it the priority over them. Before the passage of the act against fraudulent devisees, lands devised, were not liable for any debt whatever, and that statute expressly protects devisees for the payment of debts, and declares them valid: it protects the trust, and leaves the estate to its operation. The act of assembly applies to legal, and *not* to equitable assets. *Wherever real estate is made equitable assets by the will, the equitable principle*

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*must prevail*, and the executor of the ward is only entitled, therefore, to his equal proportion of the fund arising from the real estate of J. L.

A STATEMENT of the facts, and of the statute of Virginia, essential to the elucidation of the various points discussed and settled in the following opinion, is embodied in the above caption. On the 30th of June, 1828, the Chief Justice delivered his opinion as follows:

MARSHALL, C. J.—This is an application on the part of John Forbes, executor of William L. Myers, for an order that he shall receive the amount of his claim, which has been established by a decree of the court of chancery of the state, out of the proceeds of the real estate of John Lesslie, deceased, which are now in the possession of this Court for distribution among his creditors.

William L. Myers was a ward of John Lesslie, and priority is claimed for him over all other creditors out of the real estate of his guardian. This priority is claimed under the 12th section of the act "to reduce into one, the several acts concerning guardians, orphans, curators, infants, masters, and apprentices," which is in these words: "The estate of a guardian or curator, appointed under this act, not under a specific lien, shall, after the death of such guardian or curator, be liable for whatever may be due from him or her, on account of his or her guardianship, to his or her wards, before any other debt due from him or her." (1)

This clause has been, in the argument, considered in connexion with the 60th section of the "act reducing into one, the several acts concerning wills, the distribution of intestate's estates, and the duty of executors and administrators," which was passed at the same session. That section is in these words: "The executors and administrators of a guardian, of a committee, or of any other person who shall have been chargeable

(1) See 1 Revised Code (of Virginia) of 1819; ch. 108, sec. 12, page 406. Passed February 18th, 1819.—[Editor.]

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with, or accountable for the estate of a ward, an idiot, or a lunatic, or the estate of a dead person, committed to their testator or intestate, by a court of record, shall pay so much as shall be due from their testator or intestate to the ward, idiot, or lunatic, or to the legatees, or persons entitled to distribution, before any proper debt of their testator or intestate.”(2)

It has been truly said, that these two acts, having been passed at the same session, respecting the dignity of claims on the estates of deceased persons, ought to be considered together, and that the two sections ought to be construed as if they were contained in the same act. It has been added, not, I think, with the same correctness, that the one ought to restrain and limit the extent of the other.

I have to regret, that these two sections, which are certainly very interesting to the people of Virginia, have not received a settled construction in the state courts, and that this Court should be required to hazard an opinion on any point which may not heretofore have arisen in them. It is, however, my duty to state my view of the subject, which I shall be ready to correct, if a different view of it shall be taken in the state courts.

In doing this, I shall first consider the 60th section of the act concerning wills, &c., as if it stood alone. The words of that section are applicable exclusively to the conduct of executors or administrators, in disbursing the assets of their testator or intestate, which come to their hands in their official character. The language of the section will admit of no other interpretation. It applies to no other part of the decedent's estate, and regulates the conduct of no other person. The section is addressed to executors and administrators, and prescribes their duty in the case it describes. That case is the existence of a debt due from their testator or intestate, to the estate of a lunatic or of any deceased person, which may have been committed to his charge. These claims have priority to any proper

(2) See 1 Revised Code (of Virginia) of 1819; ch. 104, sec. 60, page 389. Passed March 3d, 1819.—[Editor.]



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debt of their testator or intestate, and must be paid by such executor or administrator, out of the assets which may come to his hands. I think it cannot be doubted, that as between themselves, these debts have equal dignity.

The language of the 12th section of the act, concerning guardians, &c. is entirely different. It does not address itself to the personal representatives of the deceased, nor prescribe their duty; nor does it comprehend all the persons who are described in the 60th section of the act concerning wills, &c. It affects the estate of the deceased, not under a specific lien, and provides for the single claim of a ward, on the estate of his curator or guardian. The language of this section reaches the real estate, and must have been so intended. It provides that such estate, not being under any specific lien, shall be liable for such debt, before any other debt due from him or her.

A question might arise, whether this section gave priority to a ward on the personal estate over other persons enumerated with him, in the 60th section of the act concerning wills, &c. If it did give such priority, the two acts would be inconsistent with each other. The one would give the ward a preference over persons, whom the other, in express words, placed on an equal footing with him. The rule which requires that acts *in pari materia* should be construed together, requires that the persons enumerated in the 60th section of the act concerning wills, &c. should stand equal in their claims on the personal estate, and that the 12th section of the act concerning Guardians, &c. should apply only to real estate. The same rule, however, requires that it should apply to real estate.

In making this application, I cannot doubt, that the debt due to the ward, is to be preferred to any bond debt due from the testator or intestate on his own account. The language of the act is imperative and explicit.

It has been said, that heirs commit no devastavits. From this it is inferred, that one claim can have no priority over another. I shall not examine this proposition. If its truth be admitted, the inference is not of course.

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In England, all bond debts binding the heir, unless it be the debt to the King, are equal. In Virginia, they are not equal. A debt due to the ward has a prior claim on the estate of his guardian, to any other debt due to a proper creditor of the guardian. And though I will not say that the heir or devisee may, or may not, commit a devastavit, that he may or may not plead, a debt due to a ward, to an action; I think it may be said, that where both claims come before a court administering legal assets, that which the law prefers, is entitled to preference from a tribunal which expounds and applies the law.

A question of more difficulty, is, on the operation which this statute has on the land of the guardian. Does it create a lien? If it does, the land would be bound in the hands of a purchaser. This has never been supposed, and would be an alarming construction. It would, contrary to the general policy of the law, set up a secret lien, which would be a restraint on alienations not imposed by express words, and not required by any necessary construction of the section.

Does it, without giving a lien on the land itself, create a liability of the heir or devisee to pay the debt due to the ward, in consideration of the land descended or devised, or does it merely give preference to an existing liability?

The language of the section would indicate, that priority alone was in the mind of the legislature. Its object does not seem so much to enable the ward to obtain satisfaction out of the real estate, as to give an existing claim on that estate a preference to other existing claims. The estate shall be liable to it, "before any other debt due from" the guardian. The legislature would seem to have in its mind, debts for which the estate is liable, and to decide on the dignity of those debts. If, according to the existing state of the law, all debts due to wards from the estates of their guardians, which have preference under this section, have a right to claim satisfaction from heirs and devisees, to the extent of the estate descended or devised, the statute may be construed, not as giving the right, but as giving priority to that right. But if the section applies to cases

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where no antecedent right exists, it would be difficult to resist that construction of the words, which gives the right as well as the priority. The words of the section which describe the estate to which it applies, are "The estate of a guardian or curator, appointed under this act, &c." If the words, "appointed under this act," apply to a guardian as well as a curator, then priority is given to the wards of statutory guardians only, not to the wards of testamentary guardians; and all statutory guardians are required to give bond. If they apply to a curator only, and give equal priority to a debt due to a ward, whether his guardian was created by testament or by a statute, then priority is given in a case where no antecedent right existed. Testamentary guardians are not required to give bond, if the testator has otherwise directed by his will. At least this appears to me to be the proper construction of the 2d and 5th sections of the act compared with each other.

If the words, "The estate of a guardian or curator appointed under this act, shall be liable, &c." be read with a comma, after the word "guardian," the words, "appointed under this act," could apply solely to the curator. But in the printed code, the comma is placed after the word, "curator," so as to connect the guardian with the curator, and apply the subsequent words equally to both. I am, however, aware, that not much stress is to be laid on this circumstance; and that the construction of a sentence in a legislative act does not depend on its pointing. The legislature can scarcely be supposed to have intended to distinguish between remedies for debts from testamentary and statutory guardians, and I am, therefore, disposed to read the act with the comma after the word "guardian."

But although the act directs bonds to be given by guardians, it does not prescribe the form of the bond, or that the heir shall be bound in it. The usage undoubtedly is, to bind the heirs, and it is not probable that any court would be inattentive to this circumstance. The legislature may be presumed to have had such a bond in contemplation, and to have legislated on the

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idea that the heirs were uniformly bound in it. But suppose a court should neglect to take a bond, or should take a bond in which the heirs were not named, would the general provision of the act, that the estate of the guardian shall be bound to satisfy the debt due to his ward, before any proper debt of his own, be defeated by this omission? I should feel much difficulty in answering this question in the affirmative.

The history of the legislative enactments on this subject, has been referred to in the argument.

The act of 1705, for the distribution of intestate's estates, &c., subjects the estate of any person who shall die, chargeable with the estate of any person deceased, or with any orphan's estate, to the payment of such debt, in the first instance, in terms which would apply to real as well as personal estate. The same act may be construed to require bond from testamentary guardians, or from those only to whom the orphan's estate may be committed by the court.

In the year 1748, a revisal of the laws was made. The act "for the better management and security of orphans and their estates," gives the debt due from the guardian to his ward priority against the personal estate only, and requires bond from those guardians only to whom the estates of orphans have been committed by order of court. As this revisal is understood to have been the work of the ablest lawyers of that day, it is probable that this act contains the received construction of the act of 1705.

The laws were again revised in 1779, and the bills prepared by the revisers, were enacted in 1785. The 50th section of the act concerning wills, &c., gives the same priority against the personal estate which is given by the act of March, 1819. The 1st section of the "act concerning guardians, infants, masters, and apprentices," renders the estate of every guardian liable, in the first instance, for any debt due to his ward on account of his guardianship, but requires no bond from any guardian not appointed by the court.

The revisal of 1792, re-enacts the provisions contained in the acts of 1785.

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In December, 1794, for the first time, an act was passed, requiring a testamentary guardian to give bond, before he exercises any authority over the minor or his estate, unless it is otherwise directed by the testator's will. This act took effect on the 1st day of March, 1795. From the 1st day of January, 1767, then, when the law of 1785 went into operation, until the 1st day of March, 1795, the law gave priority, against the real estate of guardians, to debts not secured by bond. Upon a review of the whole subject, I am inclined to think, contrary to my first impression, that the act of 1819 ought to be construed, as making the estate of a guardian liable to a debt due to his ward on guardianship account, and not as merely giving priority to such debt. I am not sure that this is material to the main question now before the Court.

In this case, the guardian had given a bond in which his heirs were bound; and the question is, whether the ward can now assert, in this Court, the priority given by the statute and by his bond.

The simple contract creditors maintain that he cannot; because, under the will of John Lesslie, the real estate has been converted into equitable assets.

The following are the material clauses in the will: "In the first place, I desire that all my just debts may be paid; and for this purpose I subject my whole estate, real and personal. In case it should be necessary for the purpose of paying my debts, to sell any part of my real estate, I give to my executors, after named, the power of so doing," "and authorize my said executors, or such of them as may act, to make conveyances to the purchaser or purchasers." He then gives some legacies which he charges on his whole estate, and adds, "all the rest and residue of my estate after the payment of my debts and legacies, as aforesaid, I give to my two children, Andrew and Jane." The devisees of the residue are his heirs at law.

It is contended on the part of Myers, that he is entitled to preference: 1. As a creditor by bond, in which the heirs are bound. 2. Under the act of assembly.

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1. I will first consider the general proposition, that under this will, bond creditors may assert a prior claim upon the real estate.

It must be admitted, that specialty creditors have no lien upon the lands. The heir being bound by the contract of his ancestor, is liable to the amount of assets, which he takes by descent from that ancestor, and no farther. The ancestor could devise his lands, and the devisee not being bound by the contract, held them exonerated from the creditor, or the heir could alien them, and thus also defeat the creditor, because the lands, not being specifically bound, could not be reached, and the heir at the time the writ issued, held nothing by descent.

It being thus clearly settled, that the creditor had no lien on the lands of his debtor, even after his decease, and that the heir was liable for the contract of his ancestor, in regard of lands actually held by descent at the time the writ issued, only to the amount of the land so descended, let us apply these principles to the case under consideration.

John Lesslie, by his will, subjects his whole estate to the payment of his debts, and empowers his executors, or such of them as may act, to sell his lands and convey to the purchasers.

The validity of this devise in a court of equity, has not been questioned. If it be valid, then it would seem in reason to affect the land in the same manner as a disposition of the land itself, limited to the same objects. The actual interest of the heir in the land, is no greater than if it had been devised to be sold, so far as was necessary to pay his debts, and after the payment of debts, to descend.

What then does the heir take beneficially by descent, supposing the will to go no farther than this clause? Obviously, nothing more than what remains after payment of debts. This, then, is the amount of the real assets which he holds liable to the contracts of his ancestor. Suppose this devise, instead of being for the payment of debts generally, had been for the payment of a portion to a child, in pursuance of a marriage con-

tract, or of debts due by simple contract; these devises would have been unquestionably valid, and the land would have been subject to them in equity. What then would have descended to the heir? Clearly, so much only as would remain after payment of the charge. It would seem, then, in reason, that to an action at law by a specialty creditor, the heir ought to have been permitted to show in his plea, the land that had descended, and the charge upon that land, and that in such a case, the judgment should be only for the value, after the discharge of the incumbrance. Suppose, in such a case, the heir were to pay off the portion due by marriage settlement, or the simple contract debts charged on the land, as a court of equity would, I think, compel him to do, and a suit were then to be instituted by a specialty creditor, can it be doubted for a moment, that the heir would be allowed to offset these payments against the sum for which he was chargeable, in consideration of the lands descended, if a court of law could take notice of the charge? These seem to me to be corollaries from the propositions, that, before the statute against fraudulent devises, the ancestor might devise his lands, in whole or in part, so as to defeat creditors, and that a charge upon lands, being valid, affects them to the full extent of the charge, and diminishes, *pro tanto*, the real assets in the hands of the heir.

But in England, courts of common law do not take up the subject in this reasonable point of view, because they do not take cognizance of a trust, nor have they ever sustained a suit brought by a simple contract creditor, against an heir to whom lands have descended, charged with the debts of his ancestor; nor have they, so far as I have observed, ever considered such charge, in the decision of any question brought before them, unless the heir has been also executor. When the two characters are united, so that suits at law could be sustained by simple contract creditors, the courts of common law, excluding the trust from their view, have considered the whole as legal assets. This limited view of the subject, is probably to be ascribed to their limited jurisdiction.

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I have considered the question, as if the real estate had descended to the heirs. But the testator has devised it to them, and the words of the devise rather strengthen the argument. They are:—"All the rest and residue of my estate, after payment of my debts and legacies, aforesaid, I give, devise, and bequeath to my two children, Andrew and Jane, their heirs, executors, and administrators, to be equally divided between them."

What is given to them by this will? If the words of the testator are worth anything, he gives only the residue of his estate, after payment of debts and legacies.

I will now advert to the act for the relief of creditors, against fraudulent devises.(3)

(3) See 1 Revised Code (of Virginia,) of 1819, ch. 105, p. 391. This act was passed in 1789, and is nearly an exact transcript of the English statute, 3 Will. III. ch. 14. The five first sections upon which the Chief Justice comments, are as follows:

§ 1. Whereas, it is not reasonable or just, that, by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts, and nevertheless, it hath often so happened, that, where several persons, having by bonds or other specialties bound themselves and their heirs, have afterwards died, seised in fee simple of, and in, messuages, lands, tenements, and hereditaments, or, having power or authority to dispose of, or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their last wills or testaments, devised the same, or disposed thereof in such manner as such creditors have lost their said debts: For remedying of which, and for the maintenance of just and upright dealing;

§ 2. *Be it enacted, &c.,* That all wills and testaments, limitations, dispositions or appointments, of, or concerning any messuages, lands, tenements or hereditaments, or of any rent, profit, term or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee simple in possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, shall be deemed and taken (only as against such creditor or creditors as aforesaid, his, her, and their heirs, successors, executors, administrators and assigns, and every of them,) to be fraudulent, and clearly, absolutely, and utterly void, frustrate and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding. [3 and 4 Will. and Mar. ch. 14, sec. 2.]

§ 3. And, for the means that such creditors may be enabled to recover their said debts, *Be it further enacted,* That, in the cases before-mentioned, every such creditor, shall and may, have and maintain, his, her, and their action and actions of debt,



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This act recognises the power of persons indebted by specialties, in which themselves and their heirs are bound, who die seised of lands, "to dispose of, or charge the same, by their wills or testaments," "in such manner as such creditors have lost their debts." To remedy this mischief, the 2d section enacts, "that all wills and testaments, limitations, dispositions, and appointments of, or concerning any messuages," &c., shall be utterly void as to creditors; and the 3d section gives the creditor the same remedy against the heir and devisee, as he would have had against the heir, had the land descended to him.

The 4th section provides, that where there shall be "any limitation or appointment, devise or disposition of, or concerning any messuage," &c., "for the raising or payment of any real and just debt or debts," &c., "the same, and every of them

upon his, her, and their said bonds and specialties, against the heir and heirs at law of such obligor or obligors, and such devisee or devisees, jointly, by virtue of this act; and such devisee or devisees, shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended. [*Ibid.* sec. 3.]

§ 4. Where there hath been, or shall be any limitation or appointment, devise or disposition of, or concerning any messuages, lands, tenements or hereditaments, for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person, other than the heir at law, according to, or in pursuance of any marriage contract or agreement in writing, *bona fide* made before such marriage, the same, and every of them shall be in full force; and the same messuages, lands, tenements and hereditaments, shall, and may be holden and enjoyed by every such person or persons, his, her, and their heirs, executors, administrators and assigns, for whom the said limitation, appointment, devise or disposition was made, and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators, and assigns, for such estate or interest as shall be so limited or appointed, devised or disposed, until such debt or debts, portion or portions, shall be raised, paid and satisfied; any thing in this act contained to the contrary notwithstanding. [*Ibid.* sec. 4.]

§ 5. And whereas, several persons, being heirs at law, to avoid the payment of such just debts, as, in regard of the lands, tenements and hereditaments, descending to them, they have by law been liable to pay, have sold, aliened, or made over such lands, tenements or hereditaments, before any process was or could be issued out against them.

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shall be in full force." The case comes within the very words of this part of the proviso. The will of Mr. Lesslie is "a devise or *disposition* of, or *concerning* lands," "for the raising or payment of just debts." I do not think the subsequent part of the proviso can vary the construction. The 5th section of the act applies exclusively to cases where lands, not charged by the ancestor with his debts, have been sold by the heir. In the case of *Freemoult v. Dedire*, 1 P. W., 429, the lord chancellor obviously so understood them.

This case, then, stands as it stood before the statute was enacted; and that statute has no other influence on the cause, than to furnish an argument in favour of the validity of the charges made in the will, by its recognition of their validity.

I will now consider the question on the English decisions.

At law, the books furnish, I believe, no case in which the rights of a simple contract creditor have been taken into view. To actions of debt brought against the heir on the bond of his ancestor, he has generally pleaded, "nothing by descent," and has relied on a will devising lands to him, charged with debts to support his plea.

The single inquiry made by the court has been, whether he holds at law, by descent, or by purchase. In Cr. Ch. 161;(4) and 2 Mod. 286,(5) he was considered as a purchaser; but in 1 L. R. 728,(6) and 2 Strange, 1270,(7) which last case is also reported in 1 W. Blackst. 22. it was decided that he held by descent.

If, in a court of law, which has no jurisdiction over trusts, this issue had been found in favour of the heir, the creditor would have been without remedy. A will, charging his debt on land devised to the heir, would, before the statute against fraudulent devises, have been construed to be a will depriving him of all recourse against the fund.

(4) Gilpin's case; 4 Croke's Rep. 161.—[*Editor*.] (5) *Brittam v. Charnock*.—*Id.*

(6) An heir shall take by *purchase* under a devise altering the *limitation* of the estate, but under a devise *charging* the estate only, by *descent*. *Emerson v. Inchbird*. 1 Ld. Ray. 728.—*Id.*

(7) *Allam v. Heber*; 2 Strange, 1270.—*Id.*

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In cases, where the characters of heir and executor were combined in the same person, the construction by the courts of law, that the whole fund was to be considered as constituting legal assets, seems also to result from the incompetency of those courts to act upon trusts. Common law can reach the case but partially; and its decisions, therefore, ought not to bind a court conclusively, which is so constituted as to enter into the whole subject, investigate it thoroughly, and decide upon it in all its relations.

For a time the court of chancery seems to have followed the rule of law; but it is matter of surprise, that any hesitation should ever have been made by that court, in considering the heir as a trustee, and compelling him to execute the trust according to the principles of equity. In *Hargrave v. Tindal*, reported in a note 1 Br. Ch. Rep. 136, Lord Hardwicke held an estate which descended to an infant heir, charged with debts by the will of his ancestor, to be equitable assets; and the case is still stronger if the estate be devised to the heir so charged.

The principle is well settled in chancery, where lands descend, or are devised to an heir, who is simply heir, subject to the payment of debts. The question was longer unsettled, where the will gave a power to executors to sell. The law uniformly considered the estate as legal assets, where the executors were the trustees. Equity followed the law in this respect, even where the land was devised to the executors to be sold. But in *Lewin v. Okeley*, 2 Atk. 50, Lord Camden decided that, in such a case, the assets were equitable, not legal. A distinction, not very well founded in reason, was taken between a power given to executors to sell, and a devise of the lands to be sold by executors. The descent was considered as broken in one case, not in the other. This distinction derives countenance from the great authority of Lord Coke; but is, I think, assailed in the notes of *Hargrave* and *Butler*, with arguments not easily to be refuted. However this may be at law, it is, I think, completely overruled in chancery.

This whole subject is fully considered in the case of *Silk v.*

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Prime, reported in a note 1 Br. Ch. Rep. 138. The testator charged all his real estate, except a part devised to his mother, with his debts, and directed that Prime and Maxon, who were his executors, or the survivor of them, or his heirs, should sell so much of it as might be necessary for their payment. In this case, the land was devised to his wife and two daughters, which two daughters were his heirs; and the words of the will give a naked power to the executors, and the heirs of the survivors to sell. The chancellor, after great deliberation, and a thorough examination of the cases, determined that the lands were equitable assets.

In giving his opinion, he enters into a full investigation of the subject, in which he says that he can hardly suggest a case in which the assets would be legal, but where the executor has a naked power to sell *qua* executor. It was held that the naked power was not *qua* executor in that case, because the power might be executed by the heirs of the survivor, in whose hands the produce of the sales could not be assets, nor could the creditor maintain an action at law against him.

As Mr. Lesslie has not given the power to the heirs of the executor, it may be supposed that the decision in *Silk v. Prime* is inapplicable to the case before the Court; and is rather an authority in favour of treating the assets as legal. This makes it proper to proceed somewhat farther with *Silk v. Prime*.

The chancellor obtains two rules from the dissertation he had concluded.

1. It is a good rule in expounding wills, to make them speak in favour of equitable assets, if it can be done.
2. If you can lodge the assets in the hands of the trustees, the court will never put them in the hands of the executors; and when a person is invested with both characters, the trustee shall be preferred.

In applying these rules to the particular case, the chancellor undoubtedly rests much on the extension of the power to the heir of the executor, but he does not rest on this principle solely. He relies also on other parts of the will, which I think

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would have been deemed sufficient, had the power to sell not been extended to the heirs of the surviving executor. His language in this part of his opinion is impressive.

1. It is, "The testator's will does most emphatically direct the payment of all his just debts."

"I can never think that a man who does repeatedly and so anxiously provide for the payment of all, could ever mean, by legal preference, to pay some and leave the rest unpaid."

2. The second relates to the extension of the power to the heir of the surviving executor.

3. "This is the case of a charge upon the lands.

"They are devised to the testator's wife and daughters, subject to this charge. In this respect it is a trust, and no more to be sold, than what is necessary for this purpose.

"The power, then, to sell, is merely consequential; the testator having named the executor for this purpose. The Court would have compelled the devisees. Whoever sells to satisfy a charge must be a trustee—because a charge is a trust.

"To make this case still clearer: the rents and profits in the hands of the devisees are assets before the sale; legal assets they cannot be, for the executor has no right to receive them. They must, therefore, be equitable assets: and if it be once admitted that any one part of the land is equitable assets, the whole must be the same, for the trust is one and the same trust throughout."

These reasons exist in all their force in the case under consideration. No testator could display more anxiety for the payment of all his debts, than is displayed by Mr. Lesslie.

This, too, is a charge on lands. They are devised to the daughters, subject to this charge. That the devisees are the heirs at law, can make no difference in the question now under the consideration of this Court, or which was under the consideration of the English court. That question was not and is not, whether the descent is broken by the devise, but whether the naked power to the executors to sell, converted the estate into legal assets. That question is the same in this Court as in that,

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and the language of the chancellor is as applicable, as if a third person had been a devisee with the two daughters. In this, therefore, the charge is also a trust, and no more of the land is to be sold than is necessary for the purpose.

In this case, too, the Court would compel the devisees to sell; and the power, therefore, to sell, "is merely consequential; the testator having named the executors for this purpose." The devisees would have sold under the order of the Court as trustees.

In this case, too, had the heirs received the rents and profits before the sale, they would have been equitable assets, subject to the trust.

I cannot read this part of the opinion without being convinced, that the chancellor would have decreed the assets to be equitable, although the heir of the executor had not been named.

In the case of *Newton and others v. Bennet and others*, 1 Br. C. Rep. 135, the testator, after making provision for his wife, desired, "that all his estates in Kent should be sold forthwith, and, (after payment of several sums of money,) that the remainder might be vested in his executors for the payment of his debts."

Lord Bathurst decided that these were equitable assets. Upon a re-hearing, by consent, Lord Thurlow (pp. 137, 138,) expressed the same opinion. He said, "the devise was tantamount to giving the executor a power to sell, and to apply the money to the payment of debts." In noticing the argument at the bar, that the descent was not broken, he adverts, certainly not with approbation, to the distinction taken by Lord Coke, between a devise of land to be sold by his executor and a dry power to sell. He concludes with saying: "I think the descent is broken, and that these are equitable assets," &c.

It has been contended, that this case turned entirely on the question, whether the descent was broken, and is an authority in favour of equitable assets in no case, unless the descent be broken. This argument is founded on the following words, which the reporter has ascribed to Lord Thurlow: "I think

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the descent is broken, and that these are equitable assets on the authority of Sir Joseph Jekyl. 3 P. W., 341."

The proof that these words were not uttered by Lord Thurlow, is very strong. In two cases, mentioned in a note to the report, the mistake is stated on evidence which appears to be conclusive. The opinion itself, seems to me to prove that Lord Thurlow could not have put the case on this point; if, as he says, "the devise was tantamount to giving the executor a power to sell, then the descent could not be broken, according to the construction put on such devises, by those who contend for legal assets." The reference to the case in 3 P. W., 341, in the very sentence in which this declaration is said to be made, and following that declaration as if furnishing the authority for making it, is also of some weight, because that case turns on a different question. Lord Thurlow also says: "The only matter urged, was, that where money, to be raised by the sale of lands, was given to executors, it was made personal, and must be applied in a course of administration;" "but that doctrine has not been adopted in later times, and must imply that a testator meant differently in giving to an executor, than if he had given to any other trustee."

But if the will is properly stated in the report, these words, giving them the full effect claimed for them, would make no difference in the effect of that case on the present. If, in the will of Thomas Tryon, as stated in *Newton v. Bennet*, the descent was broken, then it is broken in this case also, and in every case where a power is given to sell.

The case of *Pope v. Gwyn*, mentioned in 8 Ves. 28, was on a will in which the testator directs, that his real and personal estate should be liable for all his debts of what sort soever. Lord Thurlow held the real estate to be equitable assets.

These cases were decided before the passage of the act establishing the judiciary of the United States, which adopts the principles of chancery, as the rule in cases of equity in the federal courts.

In *Bailey v. Ekins*, 7 Ves. 319, William Garrett charged his

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real and personal estate with the payment of his debts, and devised his lands to his executors, their heirs, &c., in trust to sell and pay his debts, and apply the residue to the support and education of his heir, until he should attain his age of twenty-one, when he gave the money and real estate to his heir.

It was contended, that the descent was not broken, and that a charge did not make the estate equitable assets.

In this case, the devise is to the executors and their heirs, but this circumstance is not relied on or mentioned in the argument of counsel, or in the opinion of the court. The chancellor did not decide the question, whether the descent was broken. He said, "That *Hargrave v Tindall*, and *Burt v. Thomas*, and *Batson v. Lindegren*, were authorities, that a charge upon real estate does make it equitable assets." He said, "the rule cannot be accurate, when it is stated that the descent ought to be broken. Suppose a devise to trustees, in trust to pay debts; and all the trustees dying in the life of the testator, the estate descends upon the heir; would not that be equitable assets?" He says again, "a mere charge is no legal interest. It is not a devise to any one, but that declaration of intention upon which a court of equity will fasten, and by virtue of which they will draw out of the mass going to the heir, or to others, that quantum of interest which will be sufficient for the debts."

In *Sheppard v. Lutwidge*, 8 Ves. 26, Henry Lutwidge devised his estate to his heir, charged with the payment of his debts. The chancellor determined that the heir was a trustee, and that the estate was equitable assets.

This question, where the estate passes to the heir, or where the power to sell is given to the executor and his heirs, appears to be completely settled in England.(8) The only doubt, if there

(8) So said Kent, chancellor, in *Rutgers's Executors v. Le Roy et al.*, 4 Johns. Ch. Rep. 651. That was a devise of all the testator's estate, real and personal, to four trustees, (three of whom were executors,) in fee, in trust, to pay his debts, and then to distribute the residue. "Such a devise, in trust, places the assets under the jurisdiction of this court. A court of law, does not take cognizance of a trust; but the notice of it belongs, peculiarly and exclusively to this court."



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be a doubt, is where a naked power to sell is given to the executors, without mentioning their heirs. I think the case of *Silk v. Prime*, together with the subsequent cases, decides that under such a will, the assets are equitable.

In *Nimmo's Executor v. The Commonwealth*, 4 H. & M. 57, the testator had directed his lands to be sold for the payment of debts. I have searched the Record, but the will is not in it.

"Before the statute of 3 W. and M.," viz: the Statute against Fraudulent Devices, "if the testator devised his lands for the payment of his debts, all the creditors were to be paid *pari passu*, or in rateable proportions, for it was to be presumed, that the testator meant to do equal justice to all." "The statute of W. and M., did not interfere with this doctrine of equitable assets, but rather gave it, as it has been said, a parliamentary sanction. That statute was made for a relief of creditors against fraudulent devises; and so the preamble to it, as well as its title, expressly declares. It does not apply to the case of a devise to trustees, for the payment of debts, for such a devise is in furtherance of justice, and of the avowed policy and purpose of the statute. To mark that policy the more distinctly, the 4th section of the statute, expressly excepted from its operation, devises of lands for the payment of debts, or children's portions. The omission of this proviso in our statute," (retained in the Virginia statute, see *ante*, p. 337,) "cannot make the least alteration in its construction. It must have been omitted, because it was unnecessary, and was doubtless inserted in the English statute, for greater caution." In reviewing the English cases cited above, by Chief Justice Marshall, Chancellor Kent, says:—"In *Newton v. Bennet*, Lord Thurlow referred to the former case, and said, that an estate devised to an executor to sell, was equitable assets; and from some correct notes of this case, 7 Ves. 321, 322; 8 Ves. 30, it appears that he did not consider it to be requisite that the descent should even be broken by the devise, to render the assets equitable. It has since been repeatedly held, *Bailey v. Ekins*, 7 Ves. 319, *Sheppard v. Lutwidge*, 8 Ves. 26, that a mere charge of the debts upon the real estate by will, makes it equitable assets, even though the descent be not broken. It is sufficient that the estate be devised upon trust to pay debts; and a charge of the debts upon the real estate, is, in substance and effect, a devise, *pro tanto*. This was the doctrine of Lord Eldon, in those cases; and he made this clear and pertinent observation, that a provision by will, effectual in law or equity, for payment of creditors, was not a fraudulent devise within the statute. And I may add, that such a devise is equally valid and innocent, and commendable withal, as it would be under the protection of the proviso in the English statute."

The case of *Rutger's Executors v. Le Roy et al.*, however, the chancellor said, steered clear of every difficulty, because in that case, the descent was broken, there being a devise in fee and to a stranger, as well as to the executors. See also, *Clay &c. v. Willis*, 1 Barn. & Cres. 364; 8 Eng. Com. Law Rep. 103.—[Editor.]

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The judges all speak of it as a charge, and it is to be presumed that the sale was made by the executor, because the price of the lands is introduced into his account. The judges all say, that it is equitable assets, and that the judgment of the Commonwealth gave no priority: that those assets should be pursued in chancery.

I proceed now to consider the operation of the act of assembly on this case. It declares that the estate of a guardian or curator, shall, after his death, be liable for whatever is due to his ward on account of his guardianship, before any other debt due from him or her.

It has been already said, that this section gives priority, and creates liability if it did not before exist, but does not create a lien. The words imply a liability for other debts. One estate cannot be properly said to be liable for one debt before others, if it be not liable for others. Although, then, the section may charge lands with a debt with which they were not previously chargeable, it does not follow that it charges land in a condition not to be charged by existing law. The language of the section is comparative. It compares the charge it creates, if it does create one, with other charges, and gives it the priority over them. This can apply only to an estate, in a condition to be reached by some other debts.

Previous to the passage of the act against fraudulent devises, lands devised were not liable for any debt whatever. Lands devised for the payment of debts, being exempted from the operation of that statute, pass as they did before it was enacted, and still remain exempt from all legal liabilities. By this exemption, the statute protects the trust, and leaves the estate to its operation.

I felt much difficulty in deciding, whether the words of the section do not apply to equitable as well as legal assets. But legislation is rarely intended to act upon, and control the equitable principles which are applied by a court of chancery, unless its language be such as to leave no doubt of the intended application. Even after forming an opinion on this point, I felt

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a pressure of the question, whether a case in which the lands were to be sold under a power given to the executor, did not constitute an exception applicable to this case. After bestowing the best consideration in my power on the English cases, I have come to the conclusion, that wherever the assets are equitable, the equitable principle must prevail.

That the right of the ward to priority, where the assets are equitable, has never been asserted in this country, is not without its weight in the consideration of this case.

In the case of *Jones v. Hobson*, 2 Randolph, 483, the court of appeals determined, after an elaborate argument, as I have understood, and a profound consideration of the subject, that the sureties of an executor were not bound for money which came to his hands, on account of lands sold for the payment of debts. In delivering the opinion of the court, Judge Green, in commenting on the act which provides that the bond may be put in suit until the will "be fulfilled," "as far as lies in the executors to fulfil the same," says: "This expression is understood to relate to the fulfilment of so much of the will, as it belongs to the executors in their character of executors merely to fulfil, and not to any superadded duty imposed upon them by the will, as trustees or otherwise." (p. 497.) Again, he says: "At the common law, in whatever order the executor might be bound at law or in equity, to apply the proceeds of land to the payment of debts, he acted in relation to that subject only as trustee. It was a trust superadded to the office of executor, and not inseparable from it." (p. 498.)

He concludes so much of this very able opinion, as relates to this subject, with saying: "Upon this point we are of opinion, that the proceeds of land devised to be sold are not, and never were, a testamentary subject; that executors held such proceeds, not in their character of executors, but as trustees; that the literal terms of the executor's oath and bond, bind him only in relation to the goods, chattels and credits, of his testator; that there is nothing in our legislation on this subject, which indicates an intention that the obligation should have a greater

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extent, but the contrary; and that the sureties of an executor, are not responsible for the proceeds of lands sold by him." (pp. 501, 502.) This opinion was given in a case in which the will of the testator in all its material features, resembled that of John Lesslie. It decides positively, that in such a case, the court of appeals considers the executor as holding the money, arising from land sold by the executor under a power given by the will, as a trustee; and, consequently, that they are equitable assets.

The conclusion to which I am brought by a consideration of the cases in England and in this country, is, that the executor of Myers, is entitled, only to his equal proportion of the fund arising from the real estate.(9)

(9) Since the opinion given above was delivered, several cases have been decided by the court of appeals of Virginia, involving the question, how far certain devises should be considered as creating a charge upon the testator's real estate, and converting it into equitable assets? which it is proper to notice here.

In *Downman v. Rust et al.*, 6 Rand. 587, decided in December, 1828, the contest was between the legatees and devisees. The testatrix bequeathed two several legacies, and in the event of the legatees, (or either of them,) dying before the executor could pay the legacies, she directed the legacies to be equally divided among the heirs of the legatees respectively. The testatrix then devised *all the rest of her estate, real and personal, in fee simple*, to her brother, whom she appointed executor. It was in proof, that the testatrix lived for many years in the family of one of the legatees, (who was the mother of the other legatee,) on terms of the utmost intimacy and affection, and that the devisee was her heir at law; that the personal estate of the testatrix, at the date of the will, and at the death of the testatrix, about a month afterwards, was very inconsiderable; that, at each of these periods, she was seized of a valuable tract of land, on which her brother entered as devisee; that the devisee conveyed the land in trust, under which it was sold, and that the purchaser had notice of the claim of the legatees. It did not appear that the testatrix left any debts. The opinion of the Court was delivered by CARR, J., who said:—"Every question of a charge on lands under a will, is a question of intention. In the case of debts, it is so natural to suppose that a man in that solemn act, intended to be just, that courts have taken very slight words in a will, to imply a charge upon lands. The books are full of such cases. *Trent v. Trent*, Gilmer, 174, is one of that class. Legacies do not stand on quite so high ground, being voluntary gifts; but yet, every man is supposed to intend that they shall be paid, and to have settled in his mind, the fund for their payment; and if there be no fund but land, or if there be expressions tending to show that the testator had

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**DECREE.**—The decree rendered in this cause, directs the commissioners, R. Stanard and Samuel Taylor, to disburse the fund in their hands rateably, among all the creditors of John Lesslie, deceased, paying to John Forbes, executor of William L. Myers, deceased, the sum of \$2340 46, that being the dividend to which he was entitled on his claim, in part payment of the decree rendered in the chancery court of the state, in favour of the said Myers, against Lesslie's executor, without prejudice to the said decree.

the land in his mind, the court will turn them upon the land, rather than they should go unpaid." *Held*: 1. That the will created a charge upon the land, for the payment of the legacies. 2. That this charge followed the land into the hands of the purchaser, with notice, not, indeed, upon the ground of fraud, but upon the principle of *caveat emptor*. In this case, it may be remarked, that the will was held to create a charge upon land: 1. by implication; 2. in favour of legatees; 3. that the charge adhered to the land in the hands of a purchaser, with notice.

"I appoint A. B. my sole executor; no security to be required of him, without so much as will justify all my just debts. The residue I confide in him, to dispose of as I shall hereafter direct. I wish him to dispose of all my real estate, except, &c." In a subsequent clause, the testator bequeathed a legacy, "as soon as it can (could) be made after my (his) just debts are (were) paid." *Per curiam*. We are of opinion, that the will subjected the real estate to the payment of the testator's debts. *Dunn v. Amey et al.*, 1 Leigh, 465.

"It is my will and desire, that all my just debts be paid. After that, I wish that A. B., have \$1000, provided my estate will admit of it." The testator had real estate, which, not being disposed of by the will, descended to the heir at law. The heir at law, qualified as administrator, with the will annexed. Nearly the whole of the personal estate, which did not amount to \$1000, was absorbed by debts. The legatee filed her bill against the heir at law, praying to charge the legacy on the testator's lands, descended to him. To this bill, the heir demurred, and thus presented the question: whether the legacy could in any manner, be charged on the real estate descended?

*Per curiam*. 1. By the will, the real estate was charged with the payment of all the testator's debts. *Trent v. Trent's Executrix*, Gilmer, 174. 2. The legacy was a direct and absolute charge upon his real estate, not, indeed, by the express terms of the will, but by strong and necessary implication. *Clarke and wife v. Buck*, 1 Leigh, 487.

In *Kenney's Executors, &c. v. Harvey et al.*, 2 Leigh, 70, the testator charged his real estate with the payment of his debts, and, subject to debts, devised it to his wife, part in fee, and part for life, with remainder over. The court said that, the will constituted the real estate an equitable fund, out of which, all the creditors were entitled to satisfaction, *pari passu*.—[Editor.]

## HAMILTON, DONALDSON &amp; Co. v. CUNNINGHAM.

Before Hon. JOHN MARSHALL, Chief Justice of the United States.

Where bills are remitted by a merchant to his factor, to be converted into available funds, and the factor mingles the property of the merchant with that of others, by selling the bills on a credit, and taking a joint note, covering other sums than that stipulated to be paid for the bills, this is in accordance with the general usage, and if the parties to the note become insolvent before it is due, the factor will not be held responsible, in consequence of the mere act of taking such joint note, for the loss sustained by his employer.

A factor sells bills of his principal to C. on a credit, and takes in payment, a note of previous date, having three months to run, drawn by A. and endorsed by B., who were in good credit at the time; the note is not endorsed by C. *Held*: That the circumstances of the note being of previous date, and not endorsed by the purchaser of the bills, are not sufficient, *per se*, to outweigh the fact, that the drawer and endorser were in good credit at the time of the transaction.

Nor was it of any consequence that the name of C., the purchaser, was not communicated by the factor to his principal, the principal not having demanded of his factor the name of the purchaser.

An agent does not bear the same relation to his principal, that the holder of a bill of exchange does to the drawer or endorser. The same negligence or omission which will deprive the holder of all recourse against the drawer or endorser, will not subject the agent to his principal, to the extent of the bill placed in his hands for collection.

The relation of principal and agent, is governed by general rules of law, founded on reason, and if the principal suffers, through the remissness or negligence of the agent, *the actual loss sustained by the principal, in consequence of such misconduct*, is the standard by which his damages must be measured. But the law merchant prescribes with exactness, the course to be pursued by the holder of a bill, and has substituted a peculiar standard by which damages are to be measured for any deviation from that course. Hence,

The factor to whom commercial paper is transmitted for collection, but who does not make himself a party by putting his name upon the paper, is an ordinary agent, governed by the law which regulates the relation of principal and agent *generally*, and is not subject to the law merchant.

Where bills of exchange are transmitted by a debtor to his creditor to be sold, and the debtor directs the creditor to credit him with the proceeds; and the creditor sells the bills, partly for cash and partly for negotiable notes, and gives the debtor credit in his books for the amount, in two distinct items, first, for the notes, and secondly, for the balance in cash; this is a mere *provisional* payment, and if the

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notes be not paid, he may recur to his original claim, unless, by his subsequent conduct, he converts the *provisional* into an *absolute* payment.

But a payment which is merely *provisional* in its inception may, by legal intentment, be converted into an *absolute* payment, by the subsequent conduct of the creditor; and whether this has been done or not, must depend essentially upon the circumstances of the particular case. Thus, where the debtor in Virginia, sent to his factors, a commercial house in New York, (who were also his creditors), bills of exchange, with instructions to sell them and credit him with the proceeds; and the factors and creditors sold them, partly for cash, and partly for credit, for negotiable paper having some time to run, and credited the debtor on their books with the proceeds, but, when the paper was subsequently protested for non-payment, the factors did not, as commercial usage required them to do, communicate the fact to the debtor, though they had a regular correspondence with him, and several letters passed between them after the protest; though one of the partners was afterwards in Virginia, and received a considerable payment from the debtor in person; and where the creditors, after the protest, transmitted an account of the balance due them by their debtor, *not including therein the amount of the protested notes*, and themselves, without consultation with the debtor, instituted suits upon the protested notes against the endorser, and prosecuted it to judgment, but did not issue execution thereon; these circumstances, taken together, converted the *provisional* into an *absolute* payment; and on a suit by the creditors against the debtor to recover the balance due, the debtor was held to be entitled to a credit for the amount due upon the protested notes.

THIS was an action on the case, brought by the plaintiffs, merchants in the city of New York, against Alexander Cunningham, of Petersburg, Virginia, to recover a large sum of money alleged to have been advanced by the plaintiffs to the defendant. The following special verdict was rendered by the jury:—"They find that the defendant did assume upon himself, in manner and form, as the plaintiffs have alleged, and they assess the plaintiffs' damages, by reason of the defendant's non-performance of his said assumption, to the sum of \$4285 90, with interest thereon from the 1st day of December, 1826, till paid, if the court shall be of opinion, upon the facts set forth in the case stated, that the plaintiffs have a right to recover the two sums therein mentioned, of \$1158 28, and \$1158 29, with interest on the same; but if the court shall be of a contrary opinion, then they assess the plaintiffs' damages to \$1870 13, with interest from the 1st day of December, 1826, till paid." The following is the case stated for the opinion of the Court, referred to in the verdict of the jury:

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In the month of January, 1825, the plaintiffs were, and ever since have been, and still are, commission-merchants of the city of New York, in the state of New York, and the defendant was, and ever since has been, and yet is, a merchant of the town of Petersburg, in Virginia, dealing chiefly in cotton and other produce of the country; and during that month, the defendant employed the plaintiffs, as his agents in New York, to sell for him there, such cotton and other country produce, upon commission, belonging to the defendant, and to collect for him there, upon commission, such bills or notes, drawn upon, or payable in, New York, belonging to the defendant; and to sell or negotiate for him there, upon commission, such bills of exchange upon foreign countries, belonging to the defendant, as the defendant should, from time to time, send or remit from Petersburg, to the plaintiffs in New York, to be by them there so sold or collected for him. The correspondence between the plaintiffs and the defendant, touching this business, and the agency of the plaintiffs for the defendant, in and about the same, continued from January, 1825, till August, 1826, during which time, parcels of cotton and other produce were sent by the defendant from Petersburg, to the plaintiffs in New York, and divers notes and bills drawn upon or payable in New York, and divers bills of exchange on foreign countries, were remitted by the defendant to the plaintiffs, to be by them sold or collected for the defendant; and in the course of these transactions, the defendant was in the habit of drawing bills on the plaintiffs from time to time, and the plaintiffs were in the habit of accepting bills drawn on them by the defendant, as well on the credit of the notes, bills, and goods so placed or to be placed in their hands by the defendant, to be collected or disposed of by them for him, as for the defendant's accommodation. For all of this business, the plaintiffs charged the defendant, and he allowed them, a commission, but in no instance a *del credere* commission; and it was the understanding of the parties that no *del credere* commission should, in any instance, be charged by the plaintiffs, or allowed by the defendant, upon the business done by them for him.



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The plaintiffs, on the 28th of November, 1825, were in advance to the defendant, on account of the transactions aforesaid, above the sum of \$5000; and on the said 28th of November, the defendant remitted to the plaintiffs, two sterling bills, to be by them sold on his account in New York, and the proceeds thereof to be placed to his credit; one drawn by John Walker on Evans & Trokes, of Liverpool, for £400 sterling, and the other, drawn by the defendant himself, on W. A. & G. Maxwell, of Liverpool, for £500 sterling. These bills were enclosed in a letter from the defendant to the plaintiffs in the following words and figures, to wit:—

*“ Petersburg, November 28th, 1825.*

“ Messrs. Hamilton and Donaldson,

“ GENTLEMEN—I herewith hand you an invoice and bills of lading for 30 bales per the Star: she sailed on the morning of the 25th. I hope you will be able to make a speedy sale of this parcel at your present quotations. You have also enclosed, John Walker’s bill on Evans & Trokes, Liverpool, payable in London, for £400, and mine, on W. A. & G. Maxwell, Liverpool, payable in London, for £500. Proceeds to be placed to my credit. Cotton 14 c.

“ I am, gentlemen, yours, &c.,

“ ALEXANDER CUNNINGHAM.”

“ N. B. Your letter of 23d, only came to hand this morning. Please forward the letter of advice to Messrs. Maxwells.”

On the 1st of December, 1825, the defendant wrote another letter to the plaintiffs, in the following words and figures, to wit:

*“ Petersburg, December 1st, 1825.*

“ Messrs. Hamilton, Donaldson & Co.,

“ GENTLEMEN—I sent you, on the 28th, John Walker’s bill, on Evans & Trokes, Liverpool, for £400, and mine, on W. A. & G. Maxwell, Liverpool, for £500, with invoice and B Lading for 30 bales cotton, per Star, and letter to Messrs. Maxwells. I

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am without any of your esteemed favours since. I have now to advise my draft on you for \$2500. Please charge it to my account. Cotton has been brisker these two days past, and advanced  $\frac{1}{4}$  c.

“With respect, your most obedient servant,

“ALEXANDER CUNNINGHAM.”

The defendant's said letter to the plaintiffs, of the 28th November, 1825, and the said two sterling bills therein mentioned and enclosed, were received by the plaintiffs, on the 2d December following; and on the 7th of December, the plaintiffs sold the said two sterling bills, at New York, for \$4302 94, (net proceeds;) of which sum they received part, to wit: \$1986 37, in cash; and for \$1158 28, other part thereof, they took in payment a note of one Joseph Lyon, made payable to one Warren Rogers, and endorsed by the said Rogers in blank, dated the 7th September, 1825, and payable six months after date; and for \$1158 29, the residue thereof, they took in payment another note of the same Joseph Lyon, payable to the same Warren Rogers, and endorsed by the said Rogers in blank, dated the 13th September 1825, and payable six months after date. But the first of the said notes of the said Lyon, endorsed by the said Rogers, was not for the said sum of \$1158 28 only, but was for the sum of \$1734 80; and the last of the said notes was not for the said sum of \$1158 29 only, but was for the sum of \$1734 06: the way this happened was, that the plaintiffs had at the same time, sold other bills for one Thomson, and took these two notes of Lyon, endorsed by Rogers, in payment, as well of the two sums of \$1158 28 and \$1158 29, part of the proceeds of the defendant's said sterling bills, by them sold, as of the proceeds of the said Thomson's bills, by them sold at the same time, there being no connexion whatever between the defendant and the said Thomson, but the plaintiffs being in like manner agents for them both.

The said Joseph Lyon, and the said Warren Rogers, were both in good credit at New York, at the time the plaintiffs took

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the two said notes of the former, endorsed by the latter, in manner aforesaid; and the said notes of the said Lyon, endorsed by the said Rogers, would have been regarded by prudent and well informed merchants of New York, as good security for the sums therein expressed. At the time the plaintiffs sold the defendant's said two sterling bills, it was usual in the course of business at New York, to sell such bills on a credit, and, indeed, impracticable in the then state of the money market there, to sell them for cash; and the time which the said two notes of the said Lyon, endorsed by the said Rogers, had to run when the plaintiffs took them in manner aforesaid, did not exceed the credit then usually given upon sales of sterling bills of exchange at New York; and the blending the proceeds of the sterling bills of the defendant, sold by the plaintiffs, with the proceeds of the bills of Thomson, sold by them at the same time, and the taking notes to secure the aggregate of the sums belonging to the defendant, and to the said Thomson, as before described, was, and is, according to the usage and course of such business at New York.

The day after the plaintiffs had sold the defendant's two said sterling bills at New York, in manner aforesaid, to wit, on the 8th of December, 1825, they wrote him a letter advising him thereof, which was received by him at Petersburg, in due course of mail, and which is in the words and figures following, to wit:—

*“New York, December 8th, 1825.*

“A. Cunningham, Esq.—

“We have none of your esteemed favours to reply to. Above we beg to hand you an account sales of your sterling bills, forwarded us on 28th ult.; net proceeds as above stated, \$4302 64, viz.: at your credit 7th inst., \$1386 37; due on a note of Joseph Lyon, endorsed by Warren Rogers, \$1158 28, on the 10th March next; due on a note of the same, endorsed by the same, the 16th March next, 1158 29, which we hope will be satisfactory. The difficulty of disposing of bills here, induced us to

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take notes in payment, but in those taken, we have been particular, and think they are perfectly safe. The exchange was what private bills generally sold for yesterday. The same rate was obtained for Le Roy, Bayard & Co. only, and more of them than were sold were offered at that rate. Exchange will still get lower; the utter destruction of confidence, and the extreme scarcity of money, place many things in the very worst state; twenty-nine bales of your cotton by the Margaret Ann, have been sold at sixteen cents, agreed to sixty days; that in eight bales, at six months, adding two per cent. interest; twenty-one bales at ninety days, adding half per cent. The paper is good, it being sold to manufacturers. We wanted to close sales of all yours, but to day the article is heavy, a good deal having arrived; we shall do so, however, the first opportunity: it has just been landed. We beg your attention to further remittances, as we are much in want.

"We are, &c.,

"HAMILTON, DONALDSON & Co."

The plaintiffs charged the defendant their usual commission of one per cent. (besides brokerage) on the sale of the defendant's two said sterling bills; and on the 7th of December, 1825, passed the whole proceeds to the defendant's credit, not absolutely, as to so much thereof as was due at a future day, but provisionally, in case they should be received when due; the entries on their books touching the same, were in these words and figures, to wit:—

"1825. December 7, By J. Lyon's note favour W.

Rogers, received in part payment of sterling

bills, £900, as per account sales rendered,      \$2334 40

Cash received for balance of said bills,                      2011 80"

The defendant's two said sterling bills were not sold by the plaintiffs to the said Joseph Lyon and Warren Rogers, or to either of them, but were sold to some other person whose name

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has never been communicated by the plaintiffs to the defendant, or otherwise made known to him; and the plaintiffs' said letter to the defendant, of the 8th of December, 1825, contains all the information given by the plaintiffs to the defendant on the subject, except what may be found in the sequel of the correspondence between them, hereinafter set forth.

The said two notes of Joseph Lyon, endorsed by Warren Rogers, were made and endorsed at the city of New York, in the state of New York, and were also payable there; and by the laws of the said state, were negotiable, in like manner, as inland bills of exchange; and the said two notes, before they came to maturity, were endorsed by the plaintiffs for the mere purpose of being placed in bank for collection, and were placed for collection in one of the banks of New York; were duly presented at maturity to Lyon, the maker, and payment duly demanded of him; and, payment being refused, were duly protested for non-payment; and due notice of the dishonour thereof was given to Warren Rogers, the endorser. The said notes and the protests thereof, are in the words and figures following, to wit:

*"New York, September 7th, 1825.*

"\$ 1734 80

"Six months after date, I promise to pay to the order of Mr. Warren Rogers, seventeen hundred and thirty-four dollars and eighty cents, for valued received.

JOSEPH LYON.

(Endorsed.)

WARREN ROGERS,  
HAMILTON, DONALDSON & Co.

No. 2324.

Due 10th March, 1826.

United States of America, State of New York, to wit:

On the 10th day of March, in the year of our Lord, 1826, at the request of Messrs. Hamilton, Donaldson & Co., I, Francis R. Tillon, notary public, duly admitted and sworn, dwelling in

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the city of New York, did present the original promissory note, (a true copy whereof is above written), to a gentleman in the office of Joseph Lyon, the maker thereof, and demanded of him payment thereof. He answered, that Mr. Lyon was not within, and that it could not be paid. Now, whereupon, I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the maker and endorser of the said promissory note, as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interest already incurred, and to be hereafter incurred, for want of payment of the said promissory note.

Thus done and protested in the city of New York, aforesaid, in the presence of John Doe and Richard Roe, witnesses.

In testimonium veritatis.

F. R. TILLON, *Notary Public*.

1826. March 10th. I this day demanded payment of within as within.

WILLIAM CADLE.

1826. March 11th. I this day gave a notice to a clerk in the office of Warren Rogers.

WILLIAM CADLE."

The second note for \$1734 06, dated 13th September, 1825, payable six months after date, and falling due on the 16th March, 1826, drawn by Joseph Lyon, and endorsed by Warren Rogers, was protested in like manner with the above.

The plaintiffs did not give any notice to the defendant, of the dishonour of the two said notes of Lyon, endorsed by Rogers, until the 30th of June, 1826, when they wrote him a letter of that date, giving him the first information he had received of the dishonour of the said two notes. This letter was received by the defendant in due course of mail, and is in the words and figures following, to wit :—

"New York, June 30th, 1826.

"A. Cunningham, Esq.

"We wrote you on 21st inst., and are since without any of

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your favours. As there is upwards of \$11,000, what we are still in advance of you, it becomes necessary we should have remittances to the amount thereof, or we can draw on you. Be pleased to let us know what you would prefer: it is only important we should have one way or another, and if an accommodation of \$7000, or \$8000, of that amount can be of service to you, we have no objections to accommodate you, under the understanding that your drafts will be punctually met.

“The notes of Joseph Lyon, endorsed by Warren Rogers, for part of what your bill on W. A. & G. Maxwell for £500, and John Walker’s on Evans & Trokes for £400, were sold in part, as you will see by account sales rendered you, and by out letter of 8th December, remain unpaid. Aware of your distress, arising from other losses, and being in weekly expectation that Mr. Rogers, who has ever been considered good, would arrange the payment of them, since they became due, were the causes of our not writing you earlier on the subject, but he waives the payment of them so long, that we deem it necessary to advise you of the state of things. The notes have been regularly protested, so as to bind Mr. Rogers, and we still think he is able to pay. Your advice on the subject, however, is desirable, although we have hitherto left nothing undone to bring about payment in that way we thought best. Another house, whose bill we sold, is implicated with you in this transaction. It is unnecessary to state to you our feelings on this communication; they are painful in the extreme, knowing as we do, how you have already suffered; but we do hope that you will suffer but little, if any, by this. Mr. Rogers has promised to do something soon, and we hope it will be satisfactory to all. He is certainly sufficiently able, and has always before this, stood high for punctuality, and as a man of wealth, and in his own affairs, he is perfectly unembarrassed.

“We are, &c.,

“HAMILTON, DONALDSON & Co.”

Before the said two notes were dishonoured, to wit: on the

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13th of January, 1826, the plaintiffs wrote a letter to the defendant of that date, and endorsed him his account current, to the 1st of January, 1826, containing therein, the credits, as above stated, for the proceeds of sale of the defendant's said two sterling bills, and the debit for commission thereon, and showing a balance against the defendant of \$3306 66. This letter, and the account current enclosed, were received by the defendant at Petersburg, in due course of mail, which letter is in the words and figures following, to wit:—

*“ New York, January 13th, 1826.*

“ A. Cunningham, Esq.

“ Annexed, we beg leave to hand you account sales of your thirty bales cotton, per the Margaret Ann. Net proceeds, \$1464 42, at your credit, due 29th March next; also of your thirty bales, per the Star, net proceeds, \$1430 60, at your credit, due the 25th of February next; likewise, your account current with us, up to the 1st inst., showing a balance in our favour of \$3296 38, at that time, all of which we hope you will find correct. We closed the accounts of Messrs. A. & R. M. Cunningham in our books, the balance due on which, you will perceive you are charged with. The most part of the cotton sold, is at 13, some little at 13½, and some at 12½ a 12¾.

“ P. S. We enclose for your acceptance, Mark Wilson, Esq.'s draft on you, at 3 months, for \$2000, which be pleased to return.

“ Yours, &c.,

“ HAMILTON, DONALDSON & Co.”

After the said notes had been dishonoured, to wit, on the 21st of April, 1826, James Hamilton, one of the plaintiffs, was in the town of Petersburg, and there received from the defendant in person, on account of the dealings between the plaintiffs and the defendant, \$3000 in bank notes, and a draft for \$2000, and gave the defendant a receipt for the same, in the following words and figures, to wit:



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"Received, Petersburg, 21st April, 1826, of Alexander Cunningham, Esq., three thousand dollars in the Bank of Virginia notes, and a draft of Beers, Bunnell & Booth, on Beers & Bunnell, of New York, dated 20th April, 1826, at 60 days date, for three thousand dollars, which are to be applied to his credit, with Hamilton, Donaldson & Co., on my arrival in New York.

"JAMES HAMILTON."

Afterwards, to wit, on the 5th of May, 1826, the plaintiffs wrote a letter from New York, to the defendant of that date, wherein they say, among other things:—"Your drafts on us in favour of Mr. M'Cauley, becomes due the 19th inst., all of which, with the balance due on former account, amounts to \$8195 99." The "former account," in the passage alluded to, was the same account current rendered by the plaintiffs to the defendant, hereinbefore referred to; and the said balance of \$8195 99, is made by assuming the balance of \$3306 66, appearing due on that account current, as a correct balance, adding thereto the said drafts in favour of M'Cauley, amounting to \$5050, and the sum of \$2000, and crediting the defendant by an item of \$2160 67, for money received in March, 1826. And nothing was included in the said sum of \$8195 99, as charged to the defendant on account of the said two protested notes of Lyon, endorsed by Rogers.

On the 22d of July, 1826, the plaintiffs wrote a letter to the defendant of that date, and therein enclosed an account current, brought down to the 1st of August following, in which the defendant is charged under dates of the 10th and 16th of March, 1826, with the aforesaid two sums of \$1158 28, and \$1158 29, on account of the two protested notes of Lyon, endorsed by Rogers, which letter and account current were received by the defendant in due course of mail.

In November, 1826, the plaintiffs rendered the defendant another account current, carried down to the 1st of December following, showing that a balance would be due to the plaintiffs, at the last mentioned date, of \$4756 11, in which balance are

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included the two sums aforesaid, of \$1158 28 and \$1158 29, charged in the account rendered in July 1826, (before referred to) under dates of the 10th and 16th of March, 1826, on account of the said two protested notes of Lyon, endorsed by Rogers.

In December, 1826, an application was made to the defendant, through an agent of the plaintiffs' at Petersburg, to settle the account, and to pay or secure the balance due the plaintiffs thereon; when the defendant, (besides objecting to some other items of charge against him in the said accounts, which are not now in controversy,) objected to the said two charges against him, under dates the 10th and 16th of March, 1826, of \$1158 28, and \$1158 29, on account of the said two protested notes of Lyon, endorsed by Rogers, which two items (principal and interest,) are the only points now here in controversy: the plaintiffs insisting that the defendant is bound to pay them those two sums, with interest from the dates at which they are charged; and the defendant insisting that he is not bound to pay the plaintiffs the said two sums, or either or any part thereof, principal or interest.

(Here follows, in the agreed case, the whole correspondence between the plaintiffs and the defendant, from the origin of the transaction, which is the subject of the present controversy, until the dealings between them wholly ceased. That correspondence is very voluminous, embracing a period of more than a year, and the editor has deemed it proper to omit it; the more especially, since the portion of it which particularly applies to the two notes of Lyon, endorsed by Rogers, which constitute the subject matter of this suit, has been already incorporated in the agreed case, as above set forth.)

The plaintiffs, as endorsers of the said Warren Rogers, instituted an action at law against the said Rogers, on the beforementioned two notes of Joseph Lyon, endorsed by the said Rogers, in the supreme court of judicature, of the people of the state of New York, which action was brought to the term next ensuing the date of the protest of the said two notes, and they thereon recovered judgment against the said Rogers, in the month of May, 1827.

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No process of execution has been sued out by the plaintiffs, on the judgment obtained against Rogers.

On the 12th day of June, 1828, Chief Justice Marshall delivered the following opinion :

MARSHALL, C. J.—Before I proceed to the point on which this cause appears to me to depend, it may be proper to notice some incidental questions which have been suggested in its progress, or in the argument on the case agreed.

It was contended by the defendant, at the trial before the jury, that the plaintiffs, by mingling the property of the defendant, with that of others, in a joint note, so as to deprive him of that perfect control over it, which his interest might require, or at least to embarrass the exercise of that control, had so misconducted themselves in their agency, as to become liable for the debt. I was inclined to this opinion, but placed it upon the usage at New York. The case states that usage, so as to justify the conduct of the agency, and this is no longer a question in the cause ; but I think it proper to declare, that I satisfied myself, as soon as I looked into the subject, that my first impression was an erroneous one, and that the usage of New York, conforms to the general rule. 1 *Livermore on Agency*, 85. He quotes *Malynes Lex. Merc.* 81, 82; *Molloy, B.* 3 ch. 8, sec. 4; 2 *Dal.* 136, n. id. 134; 4 *Dal.* 136; *Beawes in his Lex. Merc.* p. 36, (of the 6th Dublin edit.) in his chapter on the Law of Factors, &c., says: "One and the same factor may, and, generally, does act for several merchants, who must run the joint risk of his actions, though they are mere strangers to one another; as if five merchants shall remit to one factor, five distinct bales of goods, and the factor make a joint sale of them to one man, who is to pay one moiety down, and the other at six months' end; if the buyer breaks before the second payment, each man must bear a proportional share of the loss, and be contented to accept of their dividend of the money advanced."

That the bills were sold upon credit, has not been urged

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against the agents as misconduct, because they gave notice thereof to their principal, who acquiesced in the sale. Independent of this fact, the sale upon credit was necessary and usual at the time, and was within the power to sell. But the defendant insists on the fact, that his agents received notes in payment for the bills, which notes had been given some time before, and were not endorsed by the purchasers of the bills. These circumstances are said to be such as cast suspicion on the notes, and ought to have restrained the agent from taking them.

What influence these circumstances, connected with others, might have on a jury, it is not for me to say. They are presented to the Court, in the case agreed by the parties, connected with no other circumstance than this: that the makers of the note were, at the time, considered as good. If A. and B. give their note to C. on account of any transaction with him, and before it becomes payable, C. wishes to negotiate it, I have never understood that, in a commercial city, this is an unusual circumstance which ought to discredit the note. If I am correct in this, I can perceive no distinction between taking the note having three months to run, and taking the note of C. the purchaser, with D. as his surety on the same credit. The whole depends on the relative credit of the parties. If A. and B. are as trustworthy at the time, as C. and D., I can perceive no solid reason for distinguishing between their notes. The same reasoning excuses the agent for not insisting on the endorsement of the purchaser. A man may be unwilling to put his name on any paper, and this might render doubtful notes still more doubtful; but ought not, I think, to discredit the notes of men whose mercantile standing was solid at the time. The circumstances, that the bills were sold for a note of previous date, on which the purchaser did not place his name, are not, I think, *per se*, sufficient to weigh down the fact, that the maker and endorser were, at the time, in good credit.

Some stress has been laid on the fact, that the name of the purchaser has not been communicated to the defendant. But

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the purchaser was not responsible, and the agent could have no motive for communicating it. Had it been demanded, suspicion might have been justified by withholding it; but no importance ought, I think, to be attached to the simple omission to communicate it, when no inquiries were made on the subject.

A point of more difficulty has been very much pressed in the argument. It is the omission of the agent to give notice of the non-payment of the notes. It is laid down generally by Paley and Chitty, that it is the duty of an agent in whose hands a bill is placed for collection, to give immediate notice of its dishonour. Both Paley and Chitty adopt the rule from Beawes' *Lex Mercatoria*, in his chapter on Bills of Exchange, &c., fig. 117, (6 Dublin ed. 373.) The passage in Beawes is in the following words:—"It is incumbent on him to whom a bill is remitted in commission; 1, to endeavour to procure acceptance: 2, on refusal, to protest, (if not forbidden,) though not expressly ordered: 3, to advise the remitter of the receipt, acceptance, or protesting it, and, in case of the latter, to send the protest to him: 4, to advise any third person, that is or may be concerned in it, and all this by the post's return, without further delay." The counsel for the defendant insists, that a neglect of the duty thus prescribed, renders the agent liable for the amount of the bill, if the debt should be lost. The plaintiffs contend, that such neglect subjects him only to compensation for the injury actually sustained from that cause.

It is plain, from the language of the sentence, that the author could not mean to say, that the failure of the agent in any part of the duty thus prescribed, would subject him, under all circumstances, to the payment of the whole bill, if it should be dishonoured by non-payment on the part of the drawee. It is declared to be equally the duty of the agent to advise the remitter, of the receipt, acceptance, or protest. These are placed in the text on the same footing. But it will not be pretended that the omission to give notice of the receipt of the bill, or of its acceptance, would render the agent liable for its amount, on the failure of the acceptor to pay.

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The defendant's counsel, however, do not put the case so strongly as to insist, that the agent, by neglecting any particular part of his duty, becomes responsible for the whole debt, should the acceptor fail. They contend that he is in the same situation as the holder of a bill, or as if he had been a party to the note, and incurs the same responsibility, for any neglect of duty, as such person would have incurred. The plaintiffs controvert this proposition.

The general rule, appears to me to be, that a person acting on commission, who by his misconduct has brought loss upon his principal, is responsible to the precise extent of the loss produced by that misconduct. The rule is very well expressed by Mr. Livermore, in his valuable treatise on Agency, Vol. I. p. 398. He says:—"The loss which the principal has sustained by reason of the negligence of his agent, I should take to be the true measure of damages, in an action founded upon that negligence. This appears to follow from the very definition of damages, being a recompense given by the jury, for the injury or wrong done to the party." And Beawes, in his chapter on Factors, &c., says:—"A factor is but a servant to the merchant, and receives from him, in lieu of wages, a commission," &c. "He ought to keep strictly to the tenor of his orders, as a deviation from them, even in the most minute particular, exposes him to make ample satisfaction for any loss that may accrue from his non-observance of them." Again he says:—"A factor should always be punctual in the advices of his transactions in sales, purchases, affreightments, and, more especially, in draughts by exchange; for if he sells goods on trust, without giving advice thereof, and the buyer breaks, *he is liable to trouble for his neglect*; and if he draws without advising his having done so, he may justly expect to have his bill returned protested." The rule which governs human transactions generally, is, that compensation shall be apportioned to the injury; and that rule is, I think, applicable to principal and agent. 2 Wilson, 325;(1) 3 Johns. N. Y. Rep. 185.(2)

(1) *Russell v. Palmer*.—[Editor.] (2) *Executors of Smedes v. Elmendorf*.—*Id.*

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To this general rule, there are some exceptions. The law merchant has made one, which stands on reasons peculiar to itself. This exception relates to commercial paper. For the benefit of trade, and to avoid endless contention respecting liabilities, on paper of that description, a set of positive rules, prescribing with precision, the exact course to be pursued by the holder, and measuring the damage in every case of deviation, has been substituted by merchants, instead of the general rule of law, that the person chargeable with negligence, shall be responsible for the damages actually produced by his misconduct. This exception, applies to all those whose names are on the paper, and to a person who has induced an endorser to take a bill by a written promise to accept, but has not, I think, been carried farther. I do not think it has been extended to an agent to whom commercial paper is transmitted for collection, but who does not make himself a party to that paper, by putting his name upon it. I find no case which establishes this principle.

Beawes, in his chapter on Bills of Exchange, &c., fig. 18, says: "When any person has bills sent him to procure an acceptance, with directions to return them or hold them at the order of the seconds, &c., and the person to whom they are sent, either forgets or neglects to demand acceptance, or if he suffers the party on whom they are drawn to delay their acceptance, and the drawer, in the interim, fail, he is certainly very blame-worthy, for his carelessness and disregard of complying with his obligation; though this will not subject him to payment of their value." Mr. Beawes, adds: "But if he should be urged and pressed to procure acceptance and payment of a bill sent him, and should protract or defer the getting it done, and the acceptant, being ignorant of the drawer's circumstances, declares he would have accepted it, had it been timely presented; the person guilty of the neglect will be obliged to make good the loss that has happened to his correspondent, purely through his omission and carelessness."

Both these cases show, very clearly, the distinction supposed

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by Mr. Beawes to exist, between an agent to whom a bill is remitted for collection, and an endorser. If the liability of an agent to his principal was the same with that of a holder to his endorser, there can be no doubt that the loss would be his in the first case put; and that it would be equally his, in the last case put, although the drawee should not declare "that he would have accepted it, had it been timely presented." The same author, in the same chapter, fig. 97, says:—"If a remitter in commission stands *del credere* for the remisees, he acts indiscreetly, if he has the bills made payable to himself or order, that he may endorse them." Among other reasons for this opinion, one is: 2, that, "the remitter by this means, makes himself liable, not only to answer all damages, &c., to his principal, but also to every possessor and endorser of the bill after him."

"3. By endorsing the bill, he makes it his own, and obliges himself on the account of his principal, not only for the value by him received, but for all other charges and re-exchanges."

"And though a remitter by commission does not stand *del credere*, he acts with equal imprudence in having the bills made payable to himself or order, and then endorses them, for thereby, he effectually engages himself to stand *del credere*, without reaping any advantage therefrom."

These passages show, that Mr. Beawes takes a clear distinction, between the relation in which an agent for collection stands to his principal, and that in which the holder of a bill stands to the drawer or endorser. The same negligence or omission which will deprive the holder of all recourse against the drawer or endorser, will not subject the agent to his principal to the extent of the bill placed in his hands for collection. His name is not on the bill, and the law merchant does not apply to him. 8 East, 242.(3)

The case of *Bridges v. Berry*, 3 Taunton, 130, was a bill drawn by the defendant himself. The decision, that the neglect of the holder to give notice to the drawer of its dishonour, de-

(3) *Warrington et al. v. Furber et al.*—[Editor.]



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prived the holder of his recourse against the drawer for a pre-existing debt, as a security for which this bill was given, belongs to a different and a much more difficult question, which I am about to examine.

The main question in the cause, and I will not affect to consider it a clear one, is this. Have the plaintiffs, by their conduct respecting these notes, made them absolute payment towards the discharge of the debt due to them from the defendant? Have they made the notes their own?

The parties stood towards each other in the double relation of principal and agent, and of debtor and creditor. This double relation does not sink either character, nor lessen the obligations imposed by either. That these notes were not applied in part payment of a pre-existing, ascertained, and fixed debt, but to the credit of the defendant in a running account, in which he was uniformly the debtor, is not, I think, a material circumstance. The transaction was not a sale of the bills of exchange, or of the notes, by the defendant to the plaintiffs; but an application of those bills, and of the notes for which they were sold, to his credit with them, in the ordinary way in which such paper is credited; that is, provisionally, to become absolute in their payment, or on such other event as may authorize the debtor to consider them as paid.

It is admitted to be incumbent on the person receiving negotiable paper under these circumstances, to use due diligence to obtain its acceptance and payment; and that neglect in these respects, converts the provisional into an absolute payment. But due diligence, it is alleged, has been used in this case; and the charge against the agents and creditors is, that they did not give notice that the notes were dishonoured. Mr. Chitty, page 126, says: "The effect of taking a bill of exchange or promissory note, in satisfaction of a precedent debt, is, that the creditor cannot proceed in an action for such debt without showing that he has used due diligence to obtain acceptance or payment; and also showing, if the defendant was a party thereto,

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or delivered it to the plaintiff, that the defendant had due notice of the dishonour."

Elementary writers sometimes state general rules as if they were universal; and do not always make those discriminations which a comparison of the cases themselves shows ought to be made; nor trace results to the true principle which produces them. Chitty is, undoubtedly, a very respectable writer; but when he carries a rule farther than the cases have carried it, the proposition he states, rests upon his own authority entirely; and when the dictum stands alone, unaccompanied by the principle on which it is founded, there is the more reason for searching out the principle, and inquiring whether that will comprehend the case which the dictum will comprehend. If it will not, we may conclude that the writer has expressed himself carelessly, and may withhold our assent from his proposition, in the broad terms in which he states it. In this case, Mr. Chitty makes it indispensable, that the defendant should have due notice of the dishonour of a note given, provisionally, in payment of a debt. In general, the person who delivers such note, has his recourse against some other person, and that recourse may be lost, if immediate measures be not taken to enforce the claim. In any case, there is an actual loss, or the law supposes a loss of the debt, and throws the hazard on him whose negligence has produced it. Mr. Chitty lays down the rule as if it did not depend on the fact, that there were other persons whose responsibility might be affected by the want of notice. The authorities on which he relies for this broad proposition, are, an act of parliament passed in the fourth year of the reign of Queen Anne, and *Bridges v. Berry*, 3 Taunton, 130.

The act of parliament is not supposed to affect this case. It may, however, be proper to advert to it. It enacts that "if any person accept any bill, for and in satisfaction of, any former debt, &c., the same shall be esteemed a complete payment of such debt, if the person do not take his due course to obtain payment thereof," &c. Mr. Chitty may have founded himself

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on his construction of this statute : so far as he has done so, his authority is inapplicable to this case.

*Bridges v. Berry*, was an action brought against the acceptor of a bill of exchange, who, when the bill fell due, obtained time and gave the holder a bill drawn and endorsed by himself on one Ivory, payable two months after date. This bill was dishonoured, and the plaintiff omitted to give notice of its non-payment to the drawer. At the trial, it was admitted, that the plaintiff could not recover upon it, but he insisted that it constituted no bar to a recovery of the original debt. The court determined that it was a bar ; and if no reason had been given for the opinion, I should admit that the case supported the principle for which it is cited. But the court does give a reason ; it is that the defendant himself had a right to sue other persons, and that the plaintiff, by not giving him due notice of its dishonour, had put it out of his power to recover what was due thereupon. This is not an argument mixed up with other arguments, conducing to the judgment of the court, but is the very principle of that judgment. It is the distinction taken in that case, and one cited in argument. It is the very foundation of the judgment, a fact, without which, the judgment would not have been rendered.

I will take the liberty to say, that this decision, if not inconsiderately made, has been very carelessly reported. The defendant was the drawer and endorser of the bill, which was dishonoured. His recourse upon it, therefore, could have been only against the acceptor. His right to recover against the acceptor, depended on having funds in his hands, and the ability to recover, could be lost only by the insolvency of the acceptor. Neither of these essential facts is stated in the report, but the opinion of the Court is founded on them, and in applying the case, we must suppose their existence. Here, then, is an actual loss sustained by the debtor, to the amount of the bill, and his exoneration from the original debt, is made to depend on that loss. The case, therefore, does not support the broad principle which Mr. Chitty has extracted from it.

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I cannot forbear noticing the distinction taken between the right to recover on the bill which had been dishonoured, and on the original debt. It was admitted that no suit could be sustained on the dishonoured bill. Why? Because the law merchant applied to it, and the doctrine of notice discharged the drawer and endorser. If this necessarily applied to the debt, on account of which the bill was given, then there could be as little question in a suit for that debt, as on the bill. The law merchant would settle one case as positively as the other; but while the claim on the bill was abandoned as desperate, that for the original debt was defeated, only by the consideration of actual loss sustained, in consequence of the negligence of the creditor who was the holder of the bill.

This distinction is still more strongly marked in *Bishop v. Rowe*, and *Same v. Bayly*; 3 Maule & Selwyn, 362.

The suit against Rowe, was on a bill of exchange, drawn and endorsed by himself, and accepted by J. Bayly. It was also endorsed by the plaintiff, and was discounted at bank for Tucker. The bill was dishonoured, and due notice given. The money was in part paid, and, for the residue, amounting to £100, Tucker drew a bill on Lewis, payable to the plaintiff, which the plaintiff endorsed, and carried to the bank. This bill was also dishonoured, but no notice given to Tucker. It was insisted that, because the remedy on the substituted bill was lost, no action could be maintained on the original debt. A verdict was taken for the plaintiff, and a rule to show cause why a new trial should not be granted, was discharged. Lord Ellenborough laid some stress on the circumstance, that the name of Tucker, though the person for whom the original bill was discounted, and who was, consequently, the debtor in fact, was not on it. Tucker was, therefore, a person intervening, and his bill was accepted, not for, and in satisfaction of a former debt, under the statute of Anne, but for the chance of its being productive. The plaintiff might have returned it presently, or within a reasonable time; and when the bill is dishonoured, unless it had been received in satisfaction of a former debt, he was not bound

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to go farther. Lord Ellenborough expressed great doubt, but was finally of opinion, that the original creditor was not bound to prove that notice was given to the drawer of the substituted bill, especially where the name of that drawer was not on the bill which constituted the original debt, for which the suit was brought. Le Blanc, J., was of opinion that no action could have been maintained on the substituted bill, for want of notice; but that the substituted bill was no payment of the original bill, unless something had been done to discharge the party to that bill. If he could have shown that by the *laches* of the plaintiff in the course of this negotiation, he had lost £100, or that he had been prevented from suing on the £100 bill, he might have made out a defence.

Bayley, J., was of opinion, that if the defendant had proved that Tucker drew on funds in the hands of the drawee, the defence might have been sustained, but not having shown this fact, he had not made out his defence.

This was, undoubtedly, a case in which the inclination of the court might be excusably in favour of the plaintiff, for justice was plainly and strongly with him. The principle, in this case, as in *Bridges v. Berry*, is, that if a bill be received as provisional payment, the omission to give due notice of its dishonour, deprives the creditor of his action on that bill, but does not compel him to take it as absolute payment, or deprive him of his action on the original debt, farther than damage has been sustained, actually, or in legal supposition, by the debtor. In both cases, the possible damage, was the loss of the funds which the drawer might have in the hands of the drawee. The court of common pleas seems to have assumed the existence of such funds; the court of king's bench required proof of the fact. They both show how entirely the question, whether a provisional, becomes an absolute payment, depends on circumstances, and how carefully all those circumstances are to be considered. Both these cases turn singly on the omission to give notice, unaccompanied with any positive act, on the part of the creditor; circumstances may undoubtedly raise a legal presumption

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against the person who is creditor, or agent, or both, which may charge him with the loss, if he is merely an agent, or convert a provisional, into an absolute payment, if he is a creditor. Some strong cases of this description have been cited, which, though decisions at *Nisi Prius*, are not to be absolutely disregarded.

In *Edgar v. Bumstead*, 1 Camp. N. P. C. 411, the plaintiff, an insurance broker, had paid money assured for an insolvent underwriter, not knowing his insolvency at the time. Lord Ellenborough was of opinion that it could not be recovered back. This opinion was placed on the known course of dealing between the insurance broker, the merchant, and the underwriter. The agent, if not acting *del credere*, would certainly not have been liable for the insolvency of the underwriter, yet, the act of voluntary payment, though made by mistake, fixed the debt due from the underwriter on him, and made it his own.

In *Jameson and Another v. Swainstone*, 2 Camp. N. P. C. 546,(4) the plaintiffs, who were insurance brokers, had effected a policy for the defendant on a vessel, which was afterwards stranded, and the plaintiffs advanced considerable sums of money to refit her for the voyage. An average loss was adjusted in May, 1806, upon which the plaintiffs transmitted an account to the defendant, debiting him with their advances, and giving him credit for the average loss due from the underwriters. The balance due on this account was immediately paid. In the month of August following, which was the usual time of settling between the brokers and the underwriters, the plaintiffs called upon the underwriters, some of whom refused to pay, on the ground of insolvency. Different applications were afterwards made, but without success. In August, 1806, the plaintiffs transmitted another account to the defendant, claiming the sum due from the insolvent underwriters; on their refusal to pay, a suit was instituted, and at the trial, Mansfield,

(4) Reported in a note to *Bousfield v. Creswell*, Executor of *Whitfield*, 2 Camp. 545.—[Editor.]

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chief justice, said, he was of opinion, that after so great a lapse of time between rendering the two accounts, the brokers, as between themselves and their principal, must be presumed either to have received actual payment from the underwriters, or to have settled with them some other way. For the purpose of recovering from the defendant, they should have apprized him in August, 1806, of the state of the underwriters, who, he was naturally led to suppose, had settled with the brokers; and their silence had deprived him, for the space of two years, of all opportunities of enforcing the policies of insurance. The verdict was for the defendant.

This is a case of simple agency. The delay will be admitted to have been such as to justify the opinion of the assured, that the money had been received by the brokers. But the language of the judge shows clearly, that immediate notice of the failure of the underwriters ought to have been given, and we are left to conjecture, for what length of time the *laches* of the agent might have been excused.

These cases, as well as those of *Andrew v. Robinson et al.*, 3 Camp. N. P. C. 199, and *Ovington v. Bell et al.*, *ib.* 237, show on what nice circumstances these questions turn.

In the case under consideration, a bill of exchange was re-mitted to the plaintiffs by the defendant, who was a debtor to the plaintiffs, in a letter of the 25th of November, 1825, directing them to sell it, and to place the proceeds to his credit with them. This bill was sold on the 7th of December, partly for cash and partly for negotiable notes, payable in March, 1826, which were endorsed to the plaintiffs, and placed by them in bank for collection. Notice of the sale was given to the defendant the succeeding day, and an account transmitted to him on the 13th of January, 1826, in which he was credited for the proceeds of the bill. The money and the notes constituted two distinct items of credit.

Thus far, the conduct of the agents was unexceptionable. The bill was transmitted to them to be converted into available funds, and if they sold it upon credit, the notes might have been

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payable to the defendant, in which case, they must have been transmitted to him to be endorsed, and returned for collection, or might be made immediately payable to themselves. The latter course was more convenient to the parties, but it subjected the agents, however correct in itself, to any disadvantage connected with it.

In March, 1826, the notes were regularly protested for non-payment. According to commercial usage, the plaintiffs ought to have given the defendant immediate notice of their dishonour, and thus have put it in his power to direct such measures, as his view of circumstances might suggest.(5) No doubt he would have been guided by the advice of the plaintiffs; but he had a right to the exercise of his judgment, and the plaintiffs ought to have enabled him to exercise it.(6) The correspondence be-

(5) Bayley on Bills, 174.—[*Editor*.]

(6) Opinion of Parsons, C. J., in *Colt et al. v. Noble*, 5 Mass. Rep. 167. "A person appointed a factor to cause a bill to be presented, is intrusted with no other powers, and it is his duty to notify his principal. The factor may not know to which of the prior parties to the bill the principal intends to resort, and if he does, he may not know their domiciles, as he has no interest in the bill or privity with the parties." The contest in that case was between the holders and the endorser. After the plaintiffs had purchased the bill of the defendant, then master of an American ship at Madras, and bound to Portsmouth, in New Hampshire, where his domicile was, they seasonably sent it to their agents, merchants in London to obtain payment of the drawers there. The agents in due time caused the bill to be protested for non-acceptance and non-payment, and in a reasonable time, returned the bill with the protests to the plaintiffs in Madras. The agents sent no notice to the domicile of the defendant, which they might have done in three months from the protests, but due notice was given by the plaintiffs from Madras. The question was, whether the agents of the holders in Madras were bound to give notice, &c. to the defendant, the endorser, or only to return the bills with the protests to their principals, who were seasonably to give notice? In the course of his opinion, Parsons, C. J., said: "It is admitted by the defendant's counsel, that if a bill be remitted in payment, the correspondent may return it to the principal, when dishonoured, and is not bound to give notice to any of the prior parties to the bill. This is true; but the reason is, that he considers himself a mere factor, until the bill be honoured. Then, as holder, he receives the money to his own use, crediting the principal with the payment. There is, therefore, no difference between the cases of a bill sent to a factor to procure acceptance, and of a bill remitted to a correspondent in payment, if the bill be dishonoured." Judgment for the plaintiffs.—[*Editor*.]



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tween the parties was regular and frequent, yet no hint was given of the non-payment of these notes, until the 13th of June, 1826. From the silence of the plaintiffs respecting these notes, through the whole of this correspondence, the defendant had certainly a right to presume that they were paid, and had undoubtedly a claim upon the plaintiffs, commensurate with their actual damages. The rule by which these damages would be ascertained, is not now the question. The defendant insists, that the payment has become absolute, without entering upon this inquiry. If the case stopped at this point, I believe my opinion would be against him. But it does not stop at this point.

It is unnecessary to discuss the intricate questions which would arise in this stage of the cause, the notes being negotiable paper; because, my opinion turns chiefly on the acts of commission on the part of the plaintiffs, taken in connexion with this act of omission, and with another which will be hereafter noticed.

On the 21st of April, 1826, James Hamilton visited the defendant in Petersburg, and received from him a very considerable payment on account of the debt to them, without mentioning the non-payment of the notes. This fact is a strong circumstance to show, that the plaintiffs relied on the notes. It is said not to be shown, that Hamilton was the partner who transacted the business, or that he was acquainted with the fact. This might be an important inquiry in a criminal prosecution; but in a civil action, brought by the firm of Hamilton, Donaldson & Co., all the partners, as residents of New York, must, I think, be presumed, unless the contrary be shown, to be residents, to be active partners, and to be acquainted with the whole transaction. The silence of Mr. Hamilton is the silence of the firm.

A still more important fact remains to be considered. On the 5th of May, 1826, the plaintiffs wrote a letter to the defendant, concerning their increased responsibility for him, in which they recognise the account transmitted in January, and re-state the balance between them, upon the principle that the notes were paid. This is, I think, equivalent to an account in which un-

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conditional credit should be given for the notes. They were then dishonoured. The plaintiffs give no notice of their dishonour, but credit the defendant for them. Had the relation between the parties been merely that of principal and agent, and the plaintiffs, instead of crediting the defendant for the notes, had paid their amount, the case would have been much stronger than that of *Edgar v. Bumstead*, because the money would have been paid, not through mistake, but with full knowledge of the insolvency of the parties to the notes. Between the payment of the money by a mere agent, and the transmission of what is equivalent to an acknowledgment of the payment of the notes, by a person who is at the same time agent and debtor, the distinction, I think, cannot easily be drawn.

I have said that there is still another act of omission which has considerable influence on this case. That is, the failure to enforce the judgment which has been obtained, or to show, otherwise, the insolvency of those who are liable for them.

I readily admit, that in general, it is sufficient for him who has received negotiable paper as a provisional payment, to present it for acceptance, and to demand payment, and in the event of the bill's being dishonoured, he may return it, and recur to his original claim. Had these notes stood in the name of the defendant, this course would have been sufficient. But they are in the name of the plaintiffs, and have been put in suit in their name. If the notes had been sent to the defendant with the name of the plaintiffs on them, they would, according to the cases, have been responsible. *Lefevre v. Floyd*, reported in 1 Marshall, 318; and 5 Taunton, 749, is expressly in point. They have, by putting the notes in suit, placed their names upon them, and have disabled themselves from striking them off. They have taken upon themselves to collect the money by suit, and ought to show their inability to do so, before they can come against the defendant.

The defendant has been prevented from exercising any power over these notes by compromise, or otherwise, by the acts and omissions of the plaintiffs. The plaintiffs have undertaken to

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collect the money by suit. Under these circumstances, I think, they cannot recover the amount of the notes in this action. Judgment must be entered for the lesser sum found by the jury.

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THE UNITED STATES V. GRAVES ET AL.

Before Hon. JOHN MARSHALL, Chief Justice of the United States.

The act of Congress respecting delinquent collectors and their sureties, created a lien on the land of the parties to the official bond; but the lien cannot be enforced until all the personal estate is exhausted, and on a joint judgment obtained against all the parties to the bond, the personal estate of all, liable to the execution must be exhausted, before the land of any one of them can be reached: in other words, the land of one surety, *who has no personal estate*, cannot be subjected to the payment of any part of the judgment, while there is personal estate in the hands of another surety, *who has paid his aliquot part of the debt*.

The process act of the United States, gives the same remedy to the United States, against the lands of delinquent collectors, that the state of Virginia gives against the lands of those against whom she has obtained a judgment.

A forthcoming bond which is forfeited, is a satisfaction of the judgment on which the execution issued; and no further proceedings can be founded on that judgment. The forthcoming bond is substituted for the original judgment, and the recourse of the plaintiff is against the parties to that bond. But, *Quære*—Does the giving such bond operate a discharge of the debt, or does it merely arrest further proceedings upon the original judgment, until the forthcoming bond shall be found to be unproductive?

As to the equitable relations between sureties and their principal, and sureties and sureties, see the following opinion:

MARSHALL, C. J.—In the year 1813, Thomas B. Ellis was appointed collector of the internal taxes of one of the districts of Virginia; and gave bond for the performance of his duty with Charles H. Graves, James Wilson, Nathaniel Cocke, and Bartholomew D. Henley, as his sureties. Having failed to ac-

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count for the moneys he had collected, his bond was put in suit; and, on the 5th of April, 1820, a judgment was rendered against Graves, Wilson, and Cocke, the surviving obligors. On a settlement at the treasury, it appears that the actual deficiency is \$7000.

The bill alleges, that Thomas B. Ellis is dead, insolvent; that the sureties, except the defendant, Graves, have paid, or are ready to pay their aliquot parts of the debt, and that Graves was, when the suit was instituted, seised of two tracts of land, which he has since conveyed away to satisfy creditors.

This suit is brought against the said Graves, and the other obligors, or their representatives, and against the purchaser of the land, said to have been in his possession, for the purpose of subjecting it to the payment of his portion of the debt.

The answer of Graves insists, that Ellis left a considerable estate, both real and personal: that an execution was issued on the judgment which was levied on six negroes, the property of some of the defendants, and a forthcoming bond given, which was forfeited: that at the rendition of the judgment, the defendant was in possession of personal estate sufficient to satisfy it. It insists on the want of due diligence on the part of the United States, and resists the lien claimed for them.

The purchasers insist that the lien, if any was created by the act of Congress, does not bind the land in their hands; that the lien is conditional, dependent on a deficiency of personal estate; that the personal estate of those against whom the judgment was rendered, was, at the time, and is now, sufficient to satisfy it; and the plaintiffs have a plain remedy at law. They deny the insolvency of Graves, and also that of Ellis. They deny also the continuance of the lien created by the judgment; but the plaintiffs do not rely on this.

The executor of Ellis denies that his estate is sufficient to satisfy the judgment.

In June, 1826, this Court directed an account of the property in possession of the defendant Graves, or in the possession of others in trust for his use. The report dated 15th of May, 1827,

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shows that Graves has taken the oath of an insolvent debtor ; but that some real and some inconsiderable articles of personal property were contained in his schedule, and that deeds have been made, of other real estate, which was in his possession, when the bill was filed.

If this real estate is chargeable with that part of the debt which ought to be paid by Graves, some farther account must be taken. If it is not so chargeable, the account would be useless. It is therefore proper, now to examine the question of lien which has been made by the defendants who are purchasers.

The act of Congress Vol. 4, p. 627. sec. 6, declares " that the amount of all debts due to the United States, by any collector of internal duties &c." (1) The first part of this section, unquestionably charges the lands and real estate of the collector and his sureties, with the amount of all debts due to the United States from the institution of the suit. The effect of this lien is, I think, as little to be doubted, as its existence. It does not, indeed, pass the estate, but it binds the land as effectually as a mortgage can bind it. A mortgage binds by force of law, and a lien, created by statute, has all the force that the law can give it. It commences with the suit, and as its object is to secure the land as a fund from which the debt may be satisfied, it terminates only when that object is accomplished.

(1) " That the amount of all debts due to the United States, by any collector of internal duties, whether secured by bond or otherwise, shall, and hereby is declared to be, a lien upon the lands and real estate of such collector, and of his sureties, if he shall have given bond, from the time when a suit shall be instituted for recovering the same ; and for want of goods and chattels, or other personal effects, of such collector or his sureties, to satisfy any judgment which shall or may be recovered against them, respectively, such lands and real estates may be sold at public auction, after being advertised for at least three weeks, in not less than three public places within the collection district, and in one newspaper printed in the county, if any there be, at least six weeks prior to the time of sale ; and for all lands or real estate, sold in pursuance of the authority aforesaid, the conveyance of the marshals, or their deputies, executed in due form of law, shall give a valid title against all persons claiming under such collector, or his sureties, respectively." 2. Story's Laws U. S. 1381, ch. 55. Act of August 2nd, 1813, Repealed. Act of 1815. ch. 237.—[Editor.]

Had the enactment terminated with that part which creates the lien, the plaintiff's case would be relieved from the most serious difficulty which opposes the relief claimed by the bill. But the section proceeds with a provision for the execution of the lien. That provision is, that the land may be sold in the manner prescribed by the act in a particular state of things, which is also prescribed. Although, then, the creation and the continuance of the lien be certain, the inquiry remains, whether that state of things exists in which it may be enforced?

In pursuing this inquiry, it may be useful to consider the subject on which the law was to operate. In every state of the Union, I believe, except Virginia, lands may be taken in execution for the payment of debts. Consequently, in every state except this, the forms of executions are such, that lands may be seized to satisfy them; and these forms are adopted for the courts of the United States. These laws, however, varied in the different states. I am not acquainted with the different regulations which prevailed, but believe, that in some instances, the land could not be sold till the personal estate was exhausted; in some, perhaps, it might be seized immediately; and, in some, it might at a valuation; but in all, I believe, an alienation, pending the suit, would convey a secure title to the purchaser.

This section, then, has two objects. First, to overreach any intermediate conveyance between the issuing of the original writ, and the service of the execution: the second, to prescribe an uniform course of proceeding against lands, under all judgments obtained by the United States, against delinquent collectors and their sureties.

In a state where land may be taken in execution, and may, in pursuance of the act of Congress, be sold at public auction, no reason can be assigned for coming into a court of equity, unless there be some fraudulent alienation before the original writ was issued. If the land may be taken in execution and sold under the judgment, there is no ground for the interposition of equity.

Under what circumstances may this execution and sale take

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place? The law answers, "when there is a want of goods and chattels, or other personal effects of such collector, or his sureties, to satisfy any judgment which shall, or may be, recovered against them, respectively." This want of goods and chattels, is a state of things that must exist, before the land can be sold to satisfy the judgment. Congress intended that the personal estate should be first exhausted.

If the suit had been instituted against only one of these obligors, it will not be contended that his land might be sold, while personal estate remained to satisfy the judgment. An officer who should sell the land in the first instance, would violate the law, would probably be restrained by the court, and would certainly expose himself to the action of the injured party. It may well be doubted, whether the title he could make would be valid.

Is any distinction to be taken between a judgment against one obligor, and a judgment against all of them? I can perceive no reason for such a distinction. The judgment is one entire thing which affects all equally; the execution also, is entire, and affects, equally, the property of all. If it possess an intrinsic quality, which postpones its capacity to reach land until the personal estate liable to it shall be exhausted, that intrinsic quality adheres to it, and applies to its operation, when emanating on a judgment against several, as completely as when emanating on a judgment against one. On a joint judgment, then, the personal estate of all liable to the execution, must be exhausted before land can be sold, unless there be something in the language of the act of Congress which shall require a different construction. I find nothing in that act which varies the general principle; nothing which may enable a court or its officer, for the sake of equality, to seize the lands of one of the debtors, while personal estate remains, which is liable to the execution, although that personal estate may belong to another, who has paid his aliquot part of the debt.

If this construction be correct then, the United States do not, under this act of Congress, possess the power to sell at discre-

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tion, for the purpose of equality, or for any purpose, the land of one of the parties against whom judgment has been obtained, while the execution may be satisfied by the personal property of others. A court of equity cannot give this right, in states where the judgment is to be satisfied out of land, by legal process. Can a different rule exist in the state of Virginia?

The act of 1789, (1 Story's Laws U. S., 67,) rendered perpetual by the act of 1792, (1 Story's Laws U. S., 257,) adopts the forms of writs and executions then in force, in the states respectively. Although, in Virginia, lands could not be taken in execution by creditors, generally, they were liable to executions issued on certain judgments rendered in favour of the commonwealth. When, then, the act of Congress declared that the lands of their debtors might be sold, in certain cases, to satisfy the debt due to the United States, the process act adopted the form of execution used by the commonwealth in the state of Virginia. Could this be doubted, the process act provides for the case of subjecting the forms of writs and executions, "to such alterations and additions as the said courts" (of the United States,) "respectively, shall, in their discretion deem expedient." (Process Act, of 1792, sec. 2, 1 Story, 258.) There is, then, I think, the same remedy at law against the lands of delinquent collectors and their sureties, in Virginia, as in other states.

Were this otherwise, were it understood that the process act did not adopt, for the United States, the execution against lands which might be issued by the commonwealth, on judgments in favour of itself, and that the omission of the court to make the necessary alteration in, and addition to, the form of the execution, rendered an application to equity necessary, still equity could interpose so far only, as to remedy the omission, and carry the intention of Congress into execution, in Virginia, as in the other states: that is, to subject the lands of those, against whom judgment has been rendered, where there is a deficiency of personal estate.

It is not alleged that such deficiency exists in this case, and,



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therefore, no foundation is laid for proceeding at law against the lands.

Has any thing occurred which authorizes a court of equity to interpose, and subject lands, which were not liable at law, to the payment of this debt?

The execution which issued on the original judgment, was levied, and a forthcoming bond given, which was forfeited. The bond was returned to court, and execution was awarded on it.

It is contended on the part of Graves, and those who claim title to lands, held by him when the original suit was instituted on the part of the United States, that these proceedings discharge the lien created by issuing the original writ. The state courts, by whose decisions on this point, this Court is bound, have, undoubtedly, determined that a forthcoming bond, when forfeited, is a satisfaction of the judgment on which the execution issued,(2) and that no farther proceedings can be founded on that payment. The forthcoming bond is substituted for the judgment, and the recourse of the plaintiff is against the parties to that bond. The forthcoming bond being considered as a satisfaction of the judgment; Graves, and those who claim under him, contend that it is necessarily a discharge of the original debt, and, consequently, of the lien created by the act of Congress.

As the opinion has been already expressed, that this lien cannot be enforced against the real estate, while personal estate remains, and as the personal estate cannot be considered as exhausted until the forthcoming bond shall be shown to be unproductive, it is not necessary at present to decide this very doubtful question. I certainly think it a doubtful question; for the bond, though a technical, is not actual satisfaction; and, though it arrests all further proceedings on the judgment, I am

(2) But a forthcoming bond is no satisfaction of a judgment, until the forfeiture. Cabell, J., in *Cooke v. Piles*, 2 Munf. 153; Roane, J., in *Ruak v. Ramsay*, 3 Munf. 454.—[Editor.]

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not entirely convinced that it extinguishes the original claim.(3) Be this as it may, the fact that it prevents a sale of the land under the judgment, cannot empower a court of equity to enforce the lien, until the impossibility of obtaining satisfaction from the bond, shall be shown. Whether equity can, even in that state of things, afford the aid which is requested, is a point on which I have not formed an opinion.(4)

The relief prayed in the bill is supported on a distinct ground from that which has been considered. It has been contended, that sureties who pay the debt, may assert the claim of the United States upon the principal, and that the equitable right which sureties have against each other for contribution, may induce the Court to decree, in this suit, against those who will be ultimately bound to the parties, who shall pay more than their just proportion of the debt.

Though both these propositions are true, I do not think that either of them can avail the plaintiffs, or those for whose benefit the principle is advanced.

The United States can impart to a surety, no other right than the United States could assert for themselves. Having no right to enforce the lien in the present state of things, they cannot impart this right to sureties. The same consideration restrains this Court from decreeing, in this cause, on the principle of contribution. The right to contribute grows out of the equitable relations of the parties with each other. If a claim exists against several defendants, and, from any circumstance, one

(3) And, therefore, where a judgment was rendered against a surety alone, on a bond executed by principal and surety, and the surety gave a forthcoming bond which was forfeited, the forfeiture of the bond, the court said, did not discharge the principal in the original bond from his liability to the claim of the obligee: and the surety could not, on the ground of the forfeiture, maintain his motion against the principal obligor. He was entitled to a judgment for the amount paid by him as surety, and a forfeited forthcoming bond was certainly not a payment. *Randolph's Administratrix v. Randolph*, 3. Rand. 490.—[*Editor*.]

(4) As to the effect of a forthcoming bond upon the original judgment see the cases cited above, and *Taylor v. Dundass*; 1. Wash. 99; *Downman v. Chinn*, 2. Wash. 189; *Jett v. Walker*, 1. Rand. 211; and 1. Rob. Practice 597.—[*Editor*.]

ought to pay more than another, or if one defendant would have a right to proceed against another for any sum he may be decreed to pay, the Court will adjust the equity between the parties, and decree in the first instance, according to their ultimate liabilities. But in this case the plaintiff has a right to a decree against any of the parties brought before the court.

If the decree against one person gives him a right upon another, against whom the plaintiff could not sustain a suit in the first instance, then I think the Court ought not to settle this controversy between the defendants, unless it could entertain a suit between the parties, brought for the purpose of settling their equities. If the decree which the plaintiff asks against the lands which form the subject of the present controversy, cannot be made for the benefit of the United States, then I think it cannot be made in the name of the United States for the benefit of a surety.(5) If the judgment against such surety gives him claims upon others, those claims must be asserted in a court which has jurisdiction of them. I do not think that the bill, so far as it asserts the right of the United States, to enforce their lien upon the lands of any of the defendants, can be sustained at present.

The counsel for the United States, having admitted that the estate of Ellis had been exhausted by process in a distinct suit, and that the debt might be satisfied from the forthcoming bond, it is ordered that the bill be dismissed without prejudice.

(5) In *Hubbard v. Goodwin*, and *Kennedy v. The Same*, 3 Leigh, 522, decided in 1832, Tucker, President, said, that the practice of decreeing between co-defendants had never been extended to any case in which the plaintiff was not entitled to a decree against *either or both of the defendants*; and the practice should not be extended farther. See also *Morris et al. v. Terrell*, 2 Rand. 6; *Templeman v. Fauntleroy*, 441 to 443, and authorities there cited; and *Poole v. Stephen*, 4 Leigh, 581.—[Editor.]

## **Circuit Court of the United States.**

**VIRGINIA, NOVEMBER TERM, 1828.**

**BEFORE**

**Hon. JOHN MARSHALL, Chief Justice of the United States.**

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### **KIRKPATRICK ET AL. V. GIBSON'S EXECUTORS.**

The amount of the security which the act of assembly of Virginia, adopting the provision of the 28 and 29 ch. 2, authorizes an administrator to take, before he makes distribution of his intestate's estate, conditioned "to refund due proportions of any debts or demands, which may afterwards appear against the intestate, and the costs attending the recovery of such debts," is within the sound discretion of the court, and need not cover the whole amount distributed. This discretion extends, it seems, to executors, though not specially named in the act. Where a British statute is re-enacted in this country, it is reasonable to suppose that the legislature designed to adopt, as well the settled construction which had been given to the act by the British courts, as the act itself.

MARSHALL, C. J.—The material question in this cause is, the amount of security which the plaintiffs, who are legatees in the will of J. Gibson, deceased, ought, on receiving their legacies, to give to the defendants, his executors, as an indemnity against the claims of such creditors, as may hereafter appear. The

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counsel for the plaintiffs insist, that the amount of this security is within the discretion of the court, and is to be regulated by the circumstances of the case. The counsel for the defendants contends, that the security ought to cover the whole sum paid, and that any less sum would not be an indemnity.

The act of assembly, which is considered as regulating this subject, is in these words: "nor shall an administrator be compelled to make distribution at any time, until bond and security be given by the persons entitled to distribution, to refund due proportions of any debts, or demands, which may afterwards appear against the intestate, and the costs attending the recovery of such debts." (1 R. C. of 1819, ch. 104, p. 389, sec. 58.)

The act of Parliament, of the 28 and 29, ch. 2, contains the same provision.

In England, the rule is settled, that the amount of the security to be demanded by the executor, is to be regulated by the sound discretion of the court. I have not seen any case declaring that a different rule is applicable to administrators.

It is contended, that the court of appeals has construed this act, as comprehending executors, though only administrators are named, and that it must be so expounded as to require a bond, equal in amount, to the sum which the distributees may be possibly required to refund.

The uniform course of the courts of the United States is, to adopt that construction of the acts of a state legislature, which the courts of the state have given to it. If, therefore, the courts of Virginia have construed this law to embrace executors in its provisions, and to require that bond shall in every case be given by the legatee, to the amount of the legacy received, this Court has only to conform to those decisions.

In the case of *Clay v. Williams*, 2 Munf. 105; and *Rootes v. Webb*, 4 Munf. 77, the court only decides, that bond and security is demandable by the executor, but is silent respecting the amount, and indicates no opinion respecting the application of the act of assembly to the case. In *Stovall's Executors v. Woodson and wife*, 2 Munf. 303, 304, the decree of the chancel-

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lor is declared "to be erroneous in this, that the appellees are not directed to give bond and security according to the provisions of the act of assembly in such case provided."

I should be much better satisfied, that I understand this decree correctly, if it was accompanied with some explanation of the principle on which it was made. But the report neither gives us the argument of counsel nor the opinion of the court. We have simply the decision in the words quoted.

In the construction of ancient statutes, courts, in search of the intent, often went far beyond the words. But in modern times, this practice has been a good deal restrained. Courts still construe words liberally, to reach that intention which the words themselves import, but seldom insert a description of persons omitted by the statute, because, in the opinion of the court, there is the same reason for comprehending those persons within its provisions, as for comprehending those who are actually enumerated. I should, therefore, be much disposed to the opinion that the court of appeals rather adopted the principle of the act, and applied it to a case confessedly within judicial discretion, than construed the act to comprehend that case. It must, however, be admitted that the words, "according to the provisions of the act of assembly in such case provided," rather favour a different opinion. But be this as it may, the case of *Stovall v. Woodson and wife*, is silent as to the amount of the security.

This point was again under consideration of the court, in the case of *Dandridge's Administrators v. Armstead and others*. The propriety of requiring security was again asserted, and the court said, that bond and security should be required by the chancellor, "to the satisfaction of the court." These words may imply, that the amount in which bond and security should be given, should be "to the satisfaction of the court," or merely that the court should be satisfied as to the sufficiency of the security to pay the sums in which the bond must necessarily be given. I rather suppose the first, to be the right construction. The words imply it. Every court, taking bond with security,

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requires, of course, to be satisfied that the security is competent to the payment of the sum mentioned in the bond. The discretion which the words indicate, would seem to be something more than would be comprehended in the sentence, had they been omitted. They indicate, that discretion respecting the sum which is, according to usage, exercised by a court of equity.

I think, then, that the decisions of the court of appeals, taken altogether, have not adopted a construction of our act of assembly essentially different from the construction which the chancellor of England had previously given to the same statute in England. I am the more inclined to this opinion, because it is reasonable to suppose, that where a British statute is re-enacted in this country, we adopt the settled construction it has received, as well as the statute itself; and such, I believe, has been the course of every court in the Union.

In this case, then, I think, the amount of the bond is within the legal discretion of the court, to be governed by circumstances; and that the length of time which has intervened, the means which have been used to give notice to creditors, and the probability of outstanding debts, are circumstances which ought to influence its opinions. If after due publication and notice, creditors will still lie by, all courts ought to protect the executor from any claim beyond the indemnity, which a court of competent jurisdiction has directed.

NOTE.—From the following extract from the decree, which was rendered in this cause, it would seem, that in the exercise of its sound discretion, the court may *dispense entirely* with refunding bonds from the legatees, in all cases in which the circumstances of the case would justify such an exercise of power. “And the Court doth further order and decree, that the defendant Spence,” (the surviving executor of John Gibson) “do pay and distribute the proceeds of the certificates for \$4300, United States six per cent stock, yet undisposed of, to and among the several plaintiffs, according to their respective

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*Kirkpatrick et al. v. Gibson's Executors.*

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rights, without their giving bond, with sureties, to refund the same, as insisted on for the defendant Spence."

It is no longer material to inquire, whether the section of our law, quoted by the Chief Justice, applied by fair construction to executors as well as administrators, for by a late act, the right to require refunding bonds of distributees, &c. is given expressly to the "executor or executrix, administrator or administratrix, or other person to whom any estate shall have been committed for administration." Sess. Acts, 1822, 1823, p. 39, ch. 37, sec. 2.—[*Editor.*]



## Circuit Court of the United States.

VIRGINIA, MAY TERM, 1829.

BEFORE

HON. JOHN MARSHALL, Chief Justice of the United States.

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### THE BANK OF THE UNITED STATES V. M'KENZIE.

The 4th section of the Act of Limitations of Virginia, limiting the right of action in certain cases, to five years after the action has accrued, applies as well to corporations as to individuals. That section has reference, not to the character of the *plaintiff*, but to the nature of the *action*.

A note was discounted at the Branch Bank of the United States, at Richmond, and after it arrived at maturity, was regularly protested for non-payment. An action on the case being brought by the Bank against the endorser to recover the amount of the note, *more than five years* from the date of the protest, the defendant pleaded the Act of Limitations. *Held*: That the right of action is barred by lapse of time, the plaintiffs not being, in the sense of the saving of the act, "beyond the seas, or out of the country." The contract having been made in Richmond, in their banking-house there, between the president and directors of the branch bank, and the defendant, the fact of there being an office of discount and deposit of the Bank of the United States, in Richmond, and of the residence of the president and directors of the branch being fixed there, must be considered, with reference to this contract, as fixing the residence of *the corporation itself* in Richmond, and not in Philadelphia, so far as the saving of the act applies to the *locality* of the plaintiffs.

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*It seems*, that actions on the case, though not within the *term* of the *proviso* of the Act of Limitations, are within its *equity*: and that it should be so construed as to embrace actions on the case.

Though "The United States" is a stockholder in the Bank of the United States, and is, so far, a party in all suits to which the Bank is a party, the doctrine of *nullum tempus occurrit regi* does not apply to exempt the Bank from the operation of the Act of Limitations: for it is a well settled principle, that where a sovereign becomes a member of a trading company, it divests itself, with reference to the transactions of the company, of the prerogatives of sovereignty, and assumes the character of a private citizen.

THIS was an action on the case, brought by the president, directors, and company, of the Bank of the United States, against Donald M'Kenzie, a citizen of Virginia, to recover the amount of a negotiable note, made by Michael W. Hancock, and endorsed by M'Kenzie. The note was for \$4000, and was discounted at the branch bank of the United States, at Richmond, and was regularly protested for non-payment on the 26th day of December, 1821. This suit was brought in 1828. The defendant pleaded the act of limitations.

The plaintiffs replied "that they ought not, &c. to be barred &c. because the plaintiffs are, and were at the time of the accrual of their action, a body corporate, duly constituted as such by an act of Congress, &c., and by the said act so constituting them a body corporate with full capacity to sue and be sued as such, their said corporation was *fixed and established in the state of Pennsylvania*, beyond the limits of the state of Virginia, &c., and the president and directors thereof *were, and are, citizens of the state of Pennsylvania, &c.*, and this they are ready to verify, &c."

The defendant rejoined that at the time of the accrual of the plaintiffs' cause of action, the plaintiffs "had, and ever since have had, and yet have, an office of discount and deposit lawfully established at Richmond, in the state of Virginia, *fore-said*, committed to the management and direction of managers or directors, annually and every year appointed, &c., which said managers or directors of the said office of discount and deposit at Richmond, have always been members, stockholders, and joint corporators of the said company of the Bank of the

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United States, and have always been citizens of the United States, and residents and inhabitants of the state of Virginia; and the said defendant in fact avers, that the said promissory note, &c. was transferred and assigned to the said plaintiffs in the course of dealings of the said Michael W. Hancock, with the plaintiffs' said office of discount and deposit at Richmond, &c. And this he is ready to verify, &c. wherefore, &c."

The plaintiffs demurred to the defendant's rejoinder, and the defendant joined in demurrer. Upon this demurrer, the following opinion was delivered by

MARSHALL, C. J.—The demurrer in this case makes the question, whether the plea of the act of limitations is a bar to the action? The fourth section of the act for limitation of actions, is copied from the English statute on the same subject, and enacts that "all actions of trespass, &c." "shall be commenced and sued within the time and limitation hereafter expressed, and not after, that is to say, the said actions upon the case other than that for slander," "within five years next after the cause of such action or suit, and not after."

It has been observed by English judges, and if the observation had never been made, the truth would be obvious to all, that if the act had contained no other clause than this, it would have barred every action it enumerated, whatever might be the character or condition of the plaintiff. It would have barred the rights of infants, *femes covert*, persons *non compos*, or beyond the sea, as well as of corporations. The enacting clause does not contemplate the *character* of the plaintiff, but looks singly to the action itself. This being an action on the case, is within the enacting clause of the statute, and must be barred by it, unless the plaintiff can be brought within the exception.

The twelfth section provides, "that if any person or persons, that is or shall be entitled to any such action of trespass, &c. be, or shall be, at the time of such action given or accrued, fallen or come within the age of twenty-one years, *feme covert*, *non*

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*compos mentis*, imprisoned, beyond the seas, or out of the country, that then, such person or persons, shall be at liberty to bring the same actions, so as they take the same within such times as are before limited," after such disability shall be removed.

The counsel for the plaintiff contends,

1. That this section limits the words of the enacting clause, so as to restrain them from operating on debts due to corporations.

2. That if this be against him, then the plaintiff is within the saving of the exception.

The argument in support of the first point, is substantially this. A corporation aggregate is not liable to any of the disabilities which are enumerated in the twelfth section; not even to that of being beyond sea, because being a mere legal entity, being entirely incorporeal, it can have no place of residence. Since it cannot be brought within the twelfth section, it ought not to be comprehended in the enactment of the fourth, because the savings of the statute must be construed to extend to every description of persons, who are the objects of the enacting clause.

This argument is, I think, anticipated and answered in the observation made on the words of the fourth section. They do not take into view the character of the plaintiff, but of the action. In construing this section, it is entirely unimportant, by whom the suit is brought. The action is equally barred by length of time, whoever may be the plaintiff. The plain words of the statute are decisive. Nor does any reason of justice or policy exist, which should take a corporation out of these words. The legislature could have no motive for limiting the time, within which a suit should be brought by an individual, which does not apply with equal force to a suit brought by a corporation.

We find no words in the exception, intimating the intention to make it co-extensive with the enacting clause, or to limit the general provision of the enacting clause to such general classes of persons, as may furnish individuals for whom justice would

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require the saving of rights, which are found in the twelfth section. An exception is not co-extensive with the provisions from which it forms the exception; and if a corporation cannot be brought within any of the savings of the statute, the inference is, not that a corporation is withdrawn from the enacting clause, but that the legislature did not think it a being whose right to sue, required a prolongation beyond the legal time, given for suitors generally.

2. The proposition that the plaintiffs are within the saving of the rights of persons out of the country, is one of more difficulty, which requires more consideration.

The enacting clause, it has been said, looks to the action only. The proviso which gives further time to those whose particular situation was supposed by the legislature to require it, looks to persons only. Its language is, "if any person or persons, that is, or shall be entitled to any such action, be, or shall be, at the time of any such cause of action given or accrued, within the age of twenty-one years," &c. "that then, such person, or persons, shall be at liberty to bring the same actions, &c."

The plaintiff, to come within the letter of the exception, must be considered as a person or persons. This, a corporation aggregate, in its capacity as a body politic, in which alone it acts, cannot be; but the statute of Virginia, is taken almost verbatim from the English statute, and, therefore, the construction which has prevailed in England, may be considered as adopted with the words, on which that construction was made. Long before the statute of Virginia was enacted, the courts of England had extended the construction of this very section, so as to embrace cases within its equity, though not within its words. This decision was not, indeed, made in a case relating to the character of the plaintiff, but in one relating to the character of the cause, which does not stand on stronger reason. In *Chandler v. Vilett*, 2 Wms. Saunders, 117, f, it was decided that an action on the case, came within the equity of the saving of the statute, though it is omitted in the enumeration of actions to

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which that saving applied.(1) The twelfth section of the act of Virginia, likewise omits this action; but I have no doubt that the courts of the state, would so construe that section, as to bring that action within it. The question, I believe, has never been raised, although the occasion for raising it, has frequently occurred. Upon this principle of liberal construction, I think, the twelfth section ought to be extended, so as to comprehend in its provisions, any plaintiff actually affected by the impediments it recites. If, then, the present plaintiff really comes within the equity of the twelfth section, I should be much inclined to allow him its benefits; but if the plaintiff claims the advantage allowed to persons, there is some reason for subjecting him to the consequences resulting from the character in which those advantages are claimed.

The plaintiff, is a corporate body, acting by the name and style, of the President, Directors & Company of the Bank of the United States, and consisting of the original subscribers to the said Bank, or their assignees. The president and directors, are to be stockholders, and are to be elected annually at the banking-house, in the city of Philadelphia, at which place, they are to carry on the operations of the said Bank. They are authorized to establish offices of discount and deposit, wherever they may think fit, and to commit the management of the said offices, and the business thereof, to such persons, and under such regulations, as they may think proper. The president and directors, transacting the business of the bank at Philadelphia,

(1) See also *Rochtschilt v. Leibman*, 2 Strange, 836. The *proviso* in the English statute, omits the action on the case *generally*, but embraces in its terms, actions on the case *for words*. The *proviso* in our statute, omits the action on the case altogether: yet, in the last case cited, the court held, that the equity of the saving, applied to an action on the case on a bill of exchange. The reason for extending the equitable construction of the saving clause of our statute to the action on the case *generally*, seems to be still stronger here than in England: for as the proviso of the English statute expressly comprehended *one species* of action on the case, while it omitted the action *generally*, it might be very plausibly argued, that every other species was excluded, upon the principle that *expressio unius, exclusio alterius*.—[Editor.]

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The Bank of the United States v. M'Kenzie.

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have, in pursuance of the power given in the Charter, established an office of discount and deposit, at Richmond, to transact the business of the Bank at that place. At this office, as at every other, the whole business is necessarily conducted in the name of the corporation, and the president and directors of this office, as at every other, are as much the agents of the corporation, as the president and directors doing business at Philadelphia. The president and directors, at Philadelphia, are neither the nominal nor real plaintiffs. The nominal plaintiffs, are the President, Directors and Company; the real plaintiffs, are all the Stockholders. The president and directors transact so much of the business of the company, as is proper for them, at their banking-house, in Philadelphia; but so much of the business of the company as is proper for the president and directors of the office at Richmond, is transacted at their banking-house, in Richmond. The contract, on which the present suit is founded, was made with the company, acting by its agents in Richmond.

To bring the plaintiff within the letter, or the spirit of the saving in the twelfth section, locality must be given to the corporation. A place of residence must be assigned to it, and that place of residence, must be out of the commonwealth of Virginia.

The counsel for the plaintiff contends, that the corporation resides in Philadelphia. How is this to be sustained? The corporate body consists of all the stockholders, and acts by a name, comprehending all the stockholders. These stockholders reside all over the United States; but being in their corporate capacity, in which alone they act, a mere legal entity, invisible, inaudible, incorporeal, they act by agents. It may be well doubted, and is doubted, whether the residence of these agents, or their place of doing business, can fix the residence of the corporation. If it can, these agents are divided into distinct bodies, residing in different states, and doing business at distinct places, in those different states. The banking-house of the president and directors of the office at Richmond, is as fixed and as notorious, as the banking-house at Philadelphia. The agents of the company, acting at Richmond, are as notoriously, and as completely its agents, as those who act at Philadelphia. If, then,

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the residence of the corporate body is fixed and ascertained, by the residence of its agents, or their place of doing business, it resides in Richmond, as truly as in Philadelphia. So far as respects this particular contract, it may, with entire propriety, be said to reside in Richmond. The contract was made here, with agents who reside here, at a banking-house established here, and is to be performed at this place. In equity and in reason, the plaintiff cannot, I think, as to this contract, if as to any, be placed in Philadelphia.

When it is recollected that we resort to the equity of the statute to bring the plaintiff or the action on the case within the terms or the operation of the twelfth section, the reason is, I think, the stronger for considering this case as excluded from it, and within the enacting clause.

The case of the Bank of the United States v. Deveaux et al., 5 Cr. 61; (2 Cond. Rep. Sup. Ct. U. S. 189,) decides this case, in principle. In that case, the court determined that it might look behind, or through the name of the corporation, and see the individuals who were the actual plaintiffs who constituted that legal entity, in whose name the corporation acted. It is very much under the sanction of that decision, that the plaintiff is brought within the twelfth section of the act; and that decision makes the plaintiff a resident of every place where any member of the corporation resides. However difficult it might be to apply the principle of that case in reason and in justice to a contract made by an individual residing and sued in a state where no office or banking-house existed, and where a straggling corporator was to be found, no difficulty can exist in applying it to a case like this, where a suit is brought in the state in which the contract was made, in which it was to be performed, and in which the agents and members of the corporation with whom the debt was contracted, and to whom it was to be paid resided.

The plaintiff also insists, that the act does not apply to this case, because the United States, being a member of the corporation, is a party plaintiff.

This argument has, I think, been fully met at the bar by the



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counsel for the defendant. In support of the argument urged at the bar, some decisions made by the supreme court, may, I think, be urged. It may well be doubted, on the authority of these cases, whether the privileges, the prerogative, if I may use the term, of the United States as a sovereign, belong to a case in which it does not appear in its sovereign capacity. In the *Postmaster General v. Early*, 12 Wheat. 186, (6 Cond. Rep. Sup. Ct. U. S., 480), the jurisdiction of the court was denied by counsel, although the suit was brought for a debt confessedly due to the United States. It was sustained, because in the opinion of the judges, it was given by an act of Congress. If jurisdiction could not be maintained without an act of Congress, much difficulty would certainly be felt in applying the prerogative of government to such a suit, so as to withdraw the bar of the statute of limitations.

In the case of *The Bank v. Deveaux et al.*, it was not even alleged that the United States was a party, because a member of the corporation, and that jurisdiction could be taken on that ground.

In *The Bank of the United States v. The Planters' Bank of Georgia*, 9 Wheat. 904, (5 Cond. Rep. Sup. Ct. U. S. 794,) the defendant pleaded to the jurisdiction of the court, because the state of Georgia was a corporator. The judges of the circuit court being divided on the question, it was referred to the supreme court. In this case, the question, whether a sovereign, becoming a member of a trading corporation, carries its sovereign prerogatives with it, was brought directly before the court. The court said:—"It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union, who have an

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interest in banks, are not suable even in their own courts, yet, they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty; it acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act.

“The government of the Union, held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the Bank. The United States was not a party to suits brought by, or against the bank, in the sense of the Constitution; so with respect to the present bank. Suits brought by or against it, are not understood to be brought by, or against the United States. The government by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the Charter.”

This case has, I think, fully decided the question, whether any prerogative of the United States, is imparted to the Bank.

In *The Bank of Kentucky v. Wister et al.*, 2 Peters, 318, it appeared that the state of Kentucky was the sole proprietor of the stock of the Bank, yet, it was determined by the court, that the case was decided by the case of the Planters' Bank of Georgia in 9 Wheat.

This point, then, is completely settled, as I think, in the supreme court.

The law is for the defendant, and judgment is to be given for him.

# Circuit Court of the United States.

VIRGINIA, NOVEMBER TERM, 1830.

BEFORE

Hon. JOHN MARSHALL, Chief Justice of the United States.

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## GREEN ET AL. V. HANBERRY'S EXECUTORS ET AL.

In a suit by sundry creditors, against the estate of their debtor, after great delays resulting from the number of parties, and the complexity of the case, a decree was rendered, establishing several of the claims, and adjusting their priorities. The administrator *de bonis non* of the debtor, at the date of the decree, was also executor of a former administrator of the estate, and claimed a large balance to be due to the estate of *his* testator, from the estate of his intestate, on his administration account. The commissioner made a favourable report on this claim, but the proper parties not being before the court, no decision was made on its validity. The decree referred to, added :—" And the Court, *without deciding that there is at this time, assets of the estate of*" the debtor, "in the hands of the administrator *de bonis non*, or, on the claim of" the administrator, &c., "to retain out of the assets in his hands, the balance he claims to be due, &c., to his testator, doth decree, &c., that the said administrator, &c., out of any assets in his hands, or to come to his hands, *applicable to the claims hereby established*: and the receiver of sundry effects and securities, &c., of the debtor's estate, &c., pay, &c." Under this decree, the receiver, without authority from the administrator *de bonis non*, transferred some securities for money due to the estate of the

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 Green et al. v. Hanberry's Executors et al.
 

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debtor, to the agent of one of the plaintiff creditors. To prevent the remittance of the money secured by these bonds, beyond the jurisdiction of the court, until the debt, (which, if established, would be of the highest dignity,) due to the estate of the former administrator, should be established, the legatees of that former administrator obtained an injunction. On the motion to dissolve this injunction, *Held*: 1. That it was immaterial whether the decree, under which the receiver acted, was final or not. The object and end of the injunction was, not to alter or modify the decree, but to secure the execution of that decree according to a sound construction of its import, and to prevent its violation under the semblance of being carried into execution. 2. The decree only ascertained the *amount and priorities* of the debts respectively, without averring assets or directing payment, leaving it to the administrator to determine on the applicability of the assets; and the receiver, being subordinate to the administrator, had no right to apply the assets, unless authorized by him to do so. *Motion to dissolve continued.*

An administrator who employs an agent to manage the estate of his intestate, collect debts, &c., is responsible for the money so collected, and creditors are not bound to pursue the agent; but if there is reason to believe that the account of the agent has not been correctly settled, the administrator should be permitted to show cause against the report, in that particular.

Where an administration bond is joint, each administrator is a surety for the other, and is bound for the whole. But if the representatives of the co-administrator against whom a balance is reported, are not before the court, the report is *ex parte* as to them, and cannot bind them, and, consequently, cannot affect his co-administrator.

THIS was a motion to dissolve an injunction awarded at the suit of the plaintiffs, legatees of the late Peter Lyons, to restrain John Wickham, one of the defendants and the attorney at law, and in fact, of the representatives of Capel and Osgood Hanberry, from paying away, if collected, a sum of money claimed by him under a decree of this Court, pronounced in December, 1828, in a suit depending between Lidderdale's Executors et al. v. Robinson's Administrator; the ultimate object of which suit is to distribute the estate of John Robinson, deceased, among his creditors, according to law.

The suit was brought, originally, by Lidderdale's Executors, against Edmund Pendleton and Peter Lyons, the administrators of the said John Robinson, to recover a sum of money due to the estate of the plaintiffs' testator. The administration accounts of the defendants on the estate of their intestate, were referred to

one of the commissioners of this Court. These accounts being unusually complicated, and the suit being, on account of their complexity, long depending, the other creditors of Robinson have filed bills, asserting their respective claims on his estate. These several claims were also referred to the commissioner, with directions to report the amount and dignity of each, in order to enable the Court to distribute the legal assets of the intestate, among the creditors, according to their respective priorities. This report having been made, the cause came on to be heard again in December, 1828, when a decree was pronounced, establishing the amount of debt payable to several of the creditors, and, also, establishing their respective priorities. The debt of lowest dignity thus established, was one due to the representatives of Capel and Osgood Hanberry, which was a simple contract debt, amounting to \$17,415 16. While the suit was depending, Peter Lyons, the surviving administrator of John Robinson, departed this life, and the suit was revived and continued against James Lyons, administrator *de bonis non* of John Robinson, and also executor of Peter Lyons, deceased. A claim to a large amount was made by the executor of Peter Lyons, deceased, as being due to him as administrator of John Robinson, deceased, and this debt, if established, would, of course, be of higher dignity, than the debt due to Hanberry's executors. A large balance was reported by the commissioner in his report of June, 1824, as due to the estate of Peter Lyons, from the estate of his intestate; but this debt was controverted on various grounds, by the counsel for Hanberry. The exceptions filed to this item of the report, are discussed by the Chief Justice in the case of Lidderdale's Executors et al. v. Robinson's Administrators, *ante*, Vol. 2, p. 159, to which the reader is referred, but no decree was rendered establishing this debt, the proper parties not being before the court.

After detailing the several claims which it established, the decree of December, 1828 adds: "And the court without deciding that there is, at this time, assets of the estate of Robinson,

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Green et al. v. Hanberry's Executors et al.

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in the hands of his administrator *de bonis non*; or, on the claim of the said James Lyons, to retain out of the assets in his hands, the balance he claims to be due, from the estate of Robinson to his testator Peter Lyons, doth decree and order that the said James Lyons, administrator *de bonis non*, of the said John Robinson, out of any assets in his hands, or to come to his hands, applicable to the claims hereby established; and James Lyons jr., the receiver of the sundry effects and securities of the said Robinson's estate, under the order of the court in this cause on the 15th of December, 1825, out of the funds by him received, or to be received, from said effects and securities, should either, or any of the creditors whose claims are hereby established, be willing to take such effects or securities at their nominal amount in discharge of their claims, pay, &c."

Under this decree, the receiver, without any authority from the administrator *de bonis non* of John Robinson, has transferred some securities for money to the estate of the said Robinson, to John Wickham, the agent of Hanberry's representatives. Among other securities assigned to Hanberry's agent, was a debt due from the estate of John Lyons, deceased, and his executor, Peter Lyons, the younger, executed two bonds for the amount of the debt, of rather more than \$5000 each, to Mr. Wickham, and executed to him a deed of mortgage, to secure the payment thereof. It was to prevent the remittance of the money, secured by these bonds and mortgage, to the creditors beyond the jurisdiction of this court, until the debt due to Peter Lyons's estate from the estate of Robinson, should be established by a decree of the court, in order that it might be, in the first instance, applied to the payment of this debt of superior dignity, that the injunction was awarded. The parties, plaintiffs to the bill of injunction, were the legatees of the said Peter Lyons, deceased.

The motion to dissolve was sustained by Mr. Wickham, on behalf of Hanberry's executors, and opposed by Mr. Chapman Johnson, of counsel for the plaintiffs.

Mr. *Wickham*, contended,

1. That the decree of December, 1828, which is partly recited above, in favour of Hanberry's representatives, being in full satisfaction of their claim on Robinson's estate, was a final decree as to them, and that they thenceforward ceased to be parties to the cause. There being no allegation or proof of fraud or collusion between Hanberry's representatives and James Lyons, the elder, the executor of Peter Lyons, deceased, and administrator *de bonis non* of John Robinson, or the receiver who assigned the securities in satisfaction of the decree, the complainants, claiming only as legatees of Peter Lyons, can have no right to arrest or open any proceedings in law or equity. The defendants are entitled to the benefit of the established rule of equity, that when a creditor has recovered of an executor or administrator, a sum of money, in a fair course of legal proceedings, no other creditor of the deceased, nor a legatee, or distributee of that creditor, has a right to interfere and compel a re-payment of the money so recovered.

2. That Peter Lyons was not a creditor of Robinson's estate, but, that on the contrary, he was largely a debtor to that estate.

It is true, that by the report of the commissioner, it appears that on a separate account raised by the commissioner between the estate of Peter Lyons, and that of John Robinson, Peter Lyons's estate is made a creditor; but there is a special statement by the commissioner, in which, by charging the estate of Peter Lyons with a balance reported in the same account to be due from Edmund Pendleton, his co-administrator, and one due from George Brooke, an agent employed by the administrators to aid them in the transaction of their business, there is a large balance due from the estate of Peter Lyons, to that of Robinson. These two charges, I maintain, are properly to be opposed to any claim on Robinson's estate, by the representatives of Peter Lyons, as the administration bond executed by Lyons and Pendleton was a joint bond, and George Brooke was employed by them in the collection and payment of debts,

and in doing the business, which they, as administrators, were themselves bound to do, or else, to be answerable for his acts.

But if this were not so, it is apparent from the report, that if the accounts were properly stated by the commissioner, Peter Lyons would be found on other grounds, so far from being a creditor, to be a debtor to Robinson's estate. For a considerable period during Lyons's administration, there were no vouchers produced to sustain the accounts. The commissioner states, that the report was made up on a former report of Commissioner Hay, to the court of chancery, which report was never confirmed. The counsel insisted, that neither the administration books, nor such a report, was a legal ground for reporting a balance in favour of Peter Lyons.(1)

Again.—Hanberry's judgment, *when assets*, was rendered in June, 1767; yet the commissioner has allowed credits to a large amount for payments made in discharge of debts subsequent to that period, due from Robinson's estate, some of them, it is believed, of no higher dignity than Hanberry's debt, and on which no judgments, or subsequent judgments were obtained. Now, I insist, that when a judgment, *when assets*, is obtained by a simple contract creditor, no payment to a creditor by simple contract, who has not obtained a judgment, can be set up against the creditor who has.

Finally, the report itself, furnishes strong internal evidence, that Peter Lyons never could have been so largely in advance to an estate, in debt to an enormous amount, without any certain prospect of reimbursement. In the year 1799, and for

(1) The question of the admissibility of this evidence, in such a case, had already been investigated by the Chief Justice, in considering the exceptions to this identical report.

The Chief Justice said, that under the circumstances of this case, after so great a lapse of time, he was strongly inclined to the opinion, that vouchers to sustain this administration account, ought not to be required; but that the books of the administrator, when they appeared to have been fairly kept, and a commissioner's report founded upon them, ought to be received as *prima facie* evidence of its correctness. See *ante*, Lidderdale's Executors et al. v. Robinson's Administrator et al., already referred to.—[Editor.]



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several succeeding years, Peter Lyons received large sums of money for Robinson's estate, besides upwards of \$5000 borrowed by him from the estate, under the direction of the court of chancery, and, that during this period, except a payment of upwards of £ 300, his payments were trifling. The commissioner manages to sink these receipts, and make a large balance due to Peter Lyons's estate, by crediting him with large advances made in the early part of his administration, and this, without any legal evidence, and relying solely on the administrators books, and Commissioner Hay's report, which was never sanctioned or confirmed in any manner. It is incredible that these large advances could have been made by the administrator, to an estate universally understood to be insolvent.

But if the Court will entertain jurisdiction of the cause, and permit the complainants to proceed, it is insisted by the counsel, who is also the counsel for Lidderdale's executors, that they shall be compelled to make Lidderdale's executors parties defendants, and as the complainants allege that James Lyons, the administrator *de bonis non* of Robinson, and executor of Peter Lyons, is dead, insolvent, that they may be compelled to pay out of the moneys and effects received by them from the said James Lyons, as legatees of Peter Lyons, whatever balance shall be found due from the estate of Peter Lyons, to that of Robinson.

Mr. *Johnson* in reply, said he could not perceive how it was important, whether the decree enjoined was final or interlocutory? This question can only affect the *form* in which its error, if there is error, is to be corrected.

Whether the parties to this bill, who are not parties to the decree, may impeach it, is another question. They are the legatees of Peter Lyons, deceased, and it may be, that the administrator is the proper representative of that estate, to correct the errors in the decree. The legatees had certainly sufficient interest to justify them in staying the money in this country during vacation, till by motion or bill of review, the decree could be examined and corrected. Now, the administrator *de*

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*bonis non* of Peter Lyons, may be regularly heard to ask a correction of the decree. If the court thinks the decree interlocutory, then, on his behalf, I submit the motion to correct it: if the court thinks the decree final, then, a bill of review will be submitted, assigning the same error.

James Lyons ceased to be the executor of Peter Lyons before his death, and the sheriff of Hanover, James Underwood, is the administrator *de bonis non*, in whose behalf the proceeding is had.

The error we complain of, is this:—That without deciding the amount due to the estate of Peter Lyons, and without ascertaining that there would be assets remaining to satisfy that amount, the court has directed payment of the simple contract debt due to Hanberry.

The commissioner's report shows a large balance due to Peter Lyons, one of the administrators of Robinson, and there are no apparent assets to satisfy it.

The report, it is true, is excepted to, but these exceptions have not been decided: and can it be right, with a report of a commissioner, uncondemned by the judgment of the court, that there should be a decree disregarding it?

Mr. Wickham urges various objections, to the balance reported as due to Peter Lyons's estate.

1. It should be reduced by charging him with Brooke's balance.

The answer to this is, that he is charged with a *moiety* of Brooke's balance, and still there remains due \$13,980 11.

2. He is liable for the balance due from the estate of his co-administrator, Edmund Pendleton.

Pendleton's representatives are not parties to the cause, and, therefore, his balance can have nothing to do with the case. They will be ready to answer that balance, whenever they are brought before the court. I have looked into Pendleton's account, and will be able to show, when his representatives are before the court, that he is a creditor, not a debtor.

3. There are no vouchers to sustain the account in favour of Peter Lyons.

**Answer.**—If, instead of settling the account, as the commissioner of this court has done, by reference to the report of Commissioner Hay, we are to proceed upon the exhibition of vouchers, then, the court must decide that point, and send us before the commissioner for the exhibition of these vouchers.

The debts and the credits have both come from Commissioner Hay's report, and if that is to be discarded, we will soon produce from the archives of state, evidences of payment into the treasury, sufficient for our purpose.

At present, however, until the court decides upon the exceptions to the report, we must hold its balances as our guide, in relation to all the parties before the court.

4. There is internal evidence in the account itself, that the enormous balance reported in favour of Peter Lyons, is not correct. He would not have been so largely in advance to an estate, regarded as insolvent.

In answer to this objection, it is sufficient to observe, that an inspection of the account will show, that the balance due to Peter Lyons, is far short of his commissions, with interest upon them, and that the sums received by him, in the latter part of his administration, have not been more than enough to sink the interest upon the arrears of his commissions. He has, therefore, not *advanced money* from his pocket, but has only omitted to retain his full commissions.

5. As Hanberry's judgment was rendered in 1767, *when assets*, the disbursements made since then, to debts due by simple contract, are a devastavit.

**Answer.**—It does not appear that there are any such disbursements, and if this fact is to be discussed, it must be before a commissioner, when the evidence must be adduced. Those disbursements do not appear to have been objected to, before the commissioner.

It is not to be presumed, against the commissioner's report, that the administrators, both legal men,(2) and men of business,

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(2) Edmund Pendleton and Peter Lyons, were both judges of the court of appeals of Virginia.—[*Editor.*]

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have committed a devastavit by paying debts, without regard to legal priority.

It appears to me, that the report must be taken as correct, or it must be sent back to a commissioner; and if any thing is claimed, on account of Mr. Pendleton's supposed balance, his representatives must be made parties. I am their counsel, and will consent to bring them before the court without delay, and have their account settled.

But Mr. Wickham insists, that the plaintiffs in the injunction case, must make all necessary parties, on pain of having the injunction dissolved. This we cannot think right; Peter Lyons's administrator *de bonis non*, has a right to be heard; he is a necessary party to the decree. He demands to be heard. He has a right by motion, or bill of review, to examine the decree, and have the errors corrected. It is a consequent right, to stay the money in this country, which that decree is about to send out. And the court would not impose upon him the necessity of becoming plaintiff, taking the labouring oar, and paying all expenses. He is defending himself; defending the claim of his intestate, to assets which ought to satisfy his demand. And there is no precedent for holding over him the penalties of an erroneous decree, to compel him to manage the plaintiffs' cause.

If Lidderdale wishes to pursue his claim, let him take the proper steps. If he thinks Peter Lyons a debtor, and that he can recover any thing from his legatees, let him make those legatees defendants. But he has no right to use Hanberry's decree, in order to coerce Lyons's legatees to make him a defendant.

For these reasons, we oppose the discharge of the attachment, and if it is discharged as to the present plaintiffs, upon any formal objections to the mode of relief which they seek, then, we ask it, or its equivalent, on behalf of the administrator *de bonis non*.

Mr. Wickham in reply to the remarks of the plaintiffs' counsel observed, that, whether the decree in favour of Han-

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berry be final or not, the complainants can have no right to impeach it, except on the ground of fraud and combination between those who were parties to the decree. He understands the uniform course of decision to be against such right; and in the case of creditors, whose right is preferable to that of legatees, he believes no case can be found, where a creditor has ever been held entitled to impeach or hinder the effect of a judgment in favour of another fair creditor, on the ground that there are not effects for both, and that his debt is of superior dignity. The reasons for the rule rest on settled principles of law and equity, and if it were not established, the counsel for the plaintiffs, might easily support his position by authority—but this he certainly cannot do.

The counsel for Hanberry's executors, considers the decree in their favour final. A sum of money is decreed to be paid, by the assignment of debts, in satisfaction of their demand. The debt of Peter Lyons, the younger, has been satisfied by the taking of a new security from him. The difference between a final and interlocutory decree, relates to the power of the court. In the former case, the party against whom it is entered, must file a bill of review, and show error in the decree, before he is entitled to relief. If the decree be interlocutory, the court can, for good cause, on motion, set it aside. Whether the present administrator of Peter Lyons can file a bill of review, is not the question; he has not done so, and the legatees have no right to set aside the proceedings in a suit fairly conducted, to which they were not, and ought not, to have been parties.

But even if the administrator of Peter Lyons were before the court, on a bill of review offered by him, there could not be the least ground for setting aside or suspending the operation of the decree at his instance, there being no evidence in the cause, that the estate of Robinson is in debt to that of Peter Lyons, but direct proof to the contrary. The reports of Commissioner Ladd have been excepted to by the counsel for Hanberry, but not by the administrator of Lyons.

Now, admitting the report to be right throughout, Peter

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Lyons's estate, at the date of the report, was indebted to that of Robinson \$6248 98, besides \$5034 42, borrowed from the court of chancery on the 19th of November, 1807, amounting, with interest, to \$9902 21, the whole amounting to \$16,151 19, as will appear by the report, page 248. It is true, this balance is obtained, by charging him with the balance due from George Brooke, his agent, and that from Edmund Pendleton, his co-administrator, for whom he was security. Now, as Brooke did the business of the estate for him, as his agent, he is, undoubtedly, liable immediately, and directly, for Brooke's acts; and as for the balance due from Pendleton, he was undoubtedly liable, and never could claim any thing from the general fund. The creditors are entitled to that, and it is the business of his administrator to go against Pendleton's estate. It is remarkable, that the commissioner, page 70, makes Pendleton's estate debtor \$11,809 29, and in page 173, makes Brooke's estate debtor \$16,839 61, the aggregate of which is, \$28,648 90, instead of \$20,229 09, which the commissioner states it to be in page 248. This plain error in the addition of these two sums, of \$8419 81, is to be added to the balance due from Peter Lyons's estate, so that it was in debt to that of Robinson's, at the date of the report, \$24,571, instead of \$16,151 19.

With regard to Edmund Pendleton's debt, he would add, that if Peter Lyons, on his own transactions, was an admitted creditor of Robinson's estate, and preferred his claim *as a creditor*, and he was an admitted debtor to the estate as surety for another person, *solvent or insolvent*, for a larger sum, he never could recover on his separate claim in law or equity; one debt being set-off against the other, he would, with respect to the debt for which he was security, be left to his remedy against his principal.

Whether this statement is right in its details or not, there cannot be any doubt *on the face of the report*, that Peter Lyons's estate is largely in debt to that of Robinson.

It is, therefore, only by showing error on the face of the report, that the plaintiff, Green, can ask a suspension of the de-

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cree, even admitting that he can stand in the place of Lyons's administrator.

Now, the report (as well it might be) was so satisfactory to the administrator of Peter Lyons, that he never filed a single exception to it, and the legatees have no right (except on the ground of fraud, which is not alleged) to step in his place, and raise objections which he did not make. It may be said, that as the suit is still depending, it is not too late to except. It is a sufficient answer to say, that by omitting to except, when the decrees in favour of Hanberry and the other creditors were asked for, he admitted that he had no objections to the report, that could affect their rights.

It is urged, that the court ought not to have decreed in favour of Hanberry, until it had decided on the report and exceptions.

The answer is, that Hanberry's claim stands, in this respect, precisely on the same footing as that of every other creditor, whose claim had been previously allowed. The counsel for the plaintiff, Green, will contend, and perhaps justly, that if Peter Lyons was a creditor of the estate for advances properly made, he had a lien on the fund for the balance, and a priority over every creditor, including those of the highest dignity. Now, in deciding on the claims that were allowed, the court *virtually* determined, that other claims, not allowed, were either not established, or to be postponed to those allowed.

But in point of fact, Lyons's account was repeatedly brought before the court, not by his administrator, who knew that he could not sustain a claim to any part of the fund; but by the counsel for Hanberry, who urged for a decree against Lyons's estate, first for the balance reported due from him in the report, including his responsibility for Mr. Pendleton, and then, for such further sum, as the exceptions that should be sustained, would give a right to. The court refused to decree against Lyons for Pendleton's balance, unless the representatives of Pendleton were made parties. This he did not choose to do, as it might delay the case, and there was ground to believe, that the fund

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would be sufficient to satisfy the claim of his clients. It was one thing to refuse a decree against Lyons without other parties, and another and very different one, to decree in his favour on his separate account, while he was liable for a much larger sum, on account of his responsibility for Mr. Pendleton and for Brooke; and it certainly never occurred to any one, that Lyons's administrator could ever recover any thing, out of the funds under the direction of the court.

But the counsel for the plaintiffs now insists, that the representatives of Lyons, have nothing to do with Pendleton's accounts. Yet the former was answerable, on the administration bond, for Pendleton's balance, and he and Roane, representatives of Lyons, are plaintiffs, and Hanberry's representatives are now entitled to all the rights of defendants in equity.

It is suggested, however, that Pendleton's account is incorrectly stated, and that he may be found a creditor. Of this there is not the smallest evidence in the cause, and it is remarkable, that the complainants, relying solely on the report for an enormous balance alleged to be due to Peter Lyons, for advances to an insolvent estate, without any probability of reimbursement, (for all the funds have since come in from the lead mine property, which was a very doubtful and litigated claim, and from Byrd's estate, which was long considered insolvent, and becoming otherwise from the rise of Richmond property), should consider this report of no authority with respect to Pendleton's estate.

But even if Pendleton's account should be thrown out of the case, Lyons's estate will be found in debt, if it is charged, as it ought to have been, in the first instance, with Brooke's balance. Brooke was the mere agent of Lyons, (or perhaps of Lyons and Pendleton jointly), and his account should have formed a part of that of the administrators; as they employed him to do their duty, his acts were theirs.

It is evident from the report, that the very great balance, reported in favour of Lyons, against all probability, rests only on a report of Commissioner Hay, which has never been confirmed



or acted on, and on Lyons's own books. On this, the counsel for the plaintiff remarks, that Lyons's commissions amount to a very great sum, and that vouchers sufficient for the purposes of the estate, can be got from the treasury.

With regard to commissions, they are always a regular and proper charge. When Mr. Lyons received money, his commission was a proper and regular charge, and the amount was his, as much as any other part of his property, and he would be just as unwilling to lose property, thus acquired, as any other; and as to his getting vouchers enough for this purpose, from the treasury, it is considered that this idea is founded on a misapprehension of an established rule of equity. Every administrator is bound by his duty and his oath, to return an inventory of goods, debts, &c., and an account. He is chargeable for all the items of account rendered by him, and can only discharge himself by vouchers; we have a right to take the debit side of his account as he renders it, and call on him for vouchers in support of the credits he claims. All his commissions are allowed him, and it is not pretended, that any credits for payments in the treasury, or any others, are omitted in the account.

He will only add, that if, contrary to the evidence in the cause, and to all probability, Peter Lyons's estate should be found in advance, there cannot be a doubt, that the funds in the hands of the receiver, absolutely secure, as he, (one of the representatives of Peter Lyons) will say, amounting to upwards of \$10,000, will be much more than sufficient to answer the claim.

Relying that the injunction will be dissolved, and the attachment discharged, the counsel for defendants submits, that if the suit goes on, proper parties should be made, and if an account is directed, there should also be an account of the estate of Pendleton, in the hands of his devisees. The complainants allege, that the executor is dead, insolvent, and if the estate of Lyons is indebted to that of Robinson, which there is every reason to believe, the creditors of the latter, ought to receive satisfaction *in this suit*, out of Lyons's estate.

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Lidderdale's executors, for whom he is counsel, who are the only creditors before the court whose claims have not been adjudged, are as much interested in every question in the cause as Hanberry's executors, except that the latter have got their decree. Whether Lidderdale's executors can be made formal parties, is perhaps no great matter, provided the complainants are held to the necessity of abiding the result of the account, if it should be against the estate of Lyons.

MARSHALL, C. J.—The motion to dissolve this injunction, is supported on several grounds, which will be separately considered.

1. It is contended, that the decree of December, 1828, was final, as to the representatives of Capel and Osgood Hanberry, and they ceased to be parties to the cause; consequently, the decree, as to them, cannot be changed by the Court, in the manner now asked, on the part of the representatives and legatees of Peter Lyons, deceased.

Were it to be admitted, that the decree is final, and that the Court cannot now modify it, this admission, would not, I think, avail the present defendant. This Court is not asked to modify or alter its decree; but to restrain the defendant from placing beyond its reach, a sum of money which the plaintiff claims, and which he insists the decree does not give to the defendant. To estimate the value of this argument, it becomes necessary to look at the decree itself, and to ascertain its extent. It does not positively assert the right of the representatives of Capel and Osgood Hanberry, to a single dollar, nor positively direct the payment of a single dollar to them. It ascertains the amount of the debt due to each individual, and the relative dignity of those debts; but does not aver the existence of assets for the payment of any one of them, and, consequently, does not direct the payment of any one of them. The Court, in express terms, refuses to decide that there are assets in the hands of the administrator *de bonis non*, which are applicable to the payment of the claims thus established, and assigns as the reason of this

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refusal, that no decision had been made on the accounts of Peter Lyons, the former administrator of Robinson, or on the claims of James Lyons, his executor, and the administrator *de bonis non* of Robinson, to retain the assets in his hands to satisfy the debt to his testator. The Court, therefore, directs the payment, not absolutely, but out of such assets as may be applicable to the claims which had been established: obviously, leaving it to the administrator to determine the applicability of the assets. The decree then proceeds to direct the receiver to pay the claims out of the money which may come to his hands, or to transfer the securities to any creditor, who would be willing to receive them at their nominal amount. The part of the decree which is addressed to the receiver, is obviously subordinate to, and dependent on, that part of it which is addressed to the administrator. The administrator must decide on the applicability of the assets, before the receiver can apply them; this is submitted to the judgment of the administrator, and might safely be submitted to him; because, being the executor of Peter Lyons, he would be careful to retain in his hands assets to satisfy that claim.

If, then, the receiver, unauthorized by the administrator, proceeds to transfer the assets to the agent of Capel and Osgood Hanberry, the injunction which detains this subject within the power of the Court, is not an alteration of the decree of December, 1828, but an order to insure the execution of the decree according to a sound construction of its import; an order to secure it from being violated under the semblance of being carried into execution.

2. The defendants insist, that Peter Lyons is not the creditor of his intestate on his administration account.

Some exceptions are taken to the report, which I have not critically examined, and upon which, the state of the cause does not require an immediate decision; but there is one important point which the Court ought now to notice.

The administrators of John Robinson, employed George Brooke as their agent, who transacted the business of the es-

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tate to a very great extent. The commissioner reports a large balance against Mr. Brooke; the representatives of Capel and Osgood Hanberry insist, that the administrators themselves are responsible for the sum in the hands of their agent, and must settle his accounts. That the creditors of Robinson are not bound to pursue him. This is true. But the case furnishes reason for the opinion, that Brooke's account may not have been accurately settled, and the Court thinks, that the representatives of Robinson's administrators ought to be permitted to show cause against the report in this particular. Whether Peter Lyons alone, should be held responsible for the whole sum, which may be due from Brooke, or whether it should be divided between the administrators, is a question which need not be decided, till the sum shall be ascertained.

3. But the counsel for the representatives of Capel and Osgood Hanberry insists, that the same report which shows Peter Lyons to be a creditor of Robinson's estate, shows Edmund Pendleton to be a debtor, and Peter Lyons is responsible for the debt due from Edmund Pendleton, because their administration bond is joint, and they are consequently sureties for each other.

This is true, and if the balance against Edmund Pendleton was regularly established, no doubt could be ascertained of the liability of Peter Lyons for it. But this balance is not established. The report, as to the representatives of Edmund Pendleton, is entirely *ex parte*, and cannot bind those representatives. The report, therefore, establishes nothing against the estate of Edmund Pendleton, and cannot be brought to bear on Peter Lyons.

I perceive, therefore, no sufficient cause for dissolving the injunction, at present. The plaintiffs in the original suit may either proceed with the investigation of the accounts of Peter Lyons, holding him responsible for his own transactions, or may make him responsible for the transactions of Edmund Pendleton, by bringing the representatives of Edmund Pendleton before the Court.

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The motion is continued.

A question of considerable importance has not been suggested, but ought to be taken into view. James Lyons, the executor of Peter Lyons, and the administrator of John Robinson, is dead, it is said, insolvent. If he died indebted to the estate of his intestate, it is an inquiry of serious import, whether the money he thus owes, ought not to be considered as so much received by him, as the executor of Peter Lyons.

Motion to discharge the attachment, and dissolve the injunction overruled, with leave to renew it; and the several reports made in the cause re-committed with directions to re-consider and report thereon, and settle, state, and report the accounts of the administration of Edmund Pendleton, deceased, on the estate of John Robinson, deceased, and the accounts of George Brooke, agent of the administrators of Robinson.

# Circuit Court of the United States.

VIRGINIA, MAY TERM, 1831.

BEFORE

Hon. JOHN MARSHALL, Chief Justice of the United States.

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## WALLIS V. THORNTON'S ADMINISTRATOR ET AL.

Where a decree directs an officer of the court to sell property, "and bring the proceeds of sale into court," and the sale is on a credit of one, two, and three years, and bonds are given for the payment of the instalments, these bonds are the immediate proceeds of sale. As a matter of convenience, they may be permitted to remain in the hands of the officer, but as matter of strict right, the creditor may require that they shall be brought into court.

Where bonds are made payable to the marshal of a court, he has a right to collect them. In such case, the marshal must be considered as a trustee for the creditor. *Quære*, whether the direction to take bond implies, that it shall be taken to the marshal, rather than to the creditor? Where bonds are taken, not to the marshal and his successors, but to J. P., marshal, &c., his executors, administrators, and assigns, could his successor, in the event of the marshal being changed before the money is paid, act on these bonds without an assignment? If bonds are made payable on or before the day mentioned in the condition, but the decree under which the sale is conducted, does not authorize the insertion of these words, it seems that the trustees have no right to receive the money before the day; if they had, the *cestui que trust* might be injured, without

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having an opportunity of providing for his safety. But, admitting that the trustees have a right to receive the money before it is due, they have no right to discount legal interest and receive only a part of the debt.

Courts of equity extend their control, not only over the acts of trustees, but over the acts of those who have any agency in enabling the trustees to violate their trust.

Where trustees sell on a credit, and receive the money before it is due, discounting legal interest, it does not operate, in equity, a discharge of the lien, but a court of chancery will consider the lien as still subsisting, and the purchaser as responsible to the creditor.

If, in the regular execution of a trust, money is paid to a trustee, his co-trustee is not liable for it, merely because he joined in the receipt; but if the trustee who received the money, had no right to receive it, his co-trustee who joins in the receipt, is considered as co-operating in a breach of trust, and will be involved in its consequences.

THE plaintiff, George W. Wallis, filed his bill against the defendants, stating, that in a suit brought by the same plaintiff against the representatives of Samuel Adams, deceased, this court, in December, 1825, decreed, that unless the defendants, on or before the 15th day of January, 1826, paid \$8017 26, with interest, to the plaintiff, the marshal should proceed to sell on a credit of twelve months, or such farther time as the plaintiff's counsel should direct, a tract of land, lying in Henrico, with directions to take bonds with approved security, and a deed of trust on the land. The marshal was directed to sell on a credit of one, two, and three years. Anthony R. Thornton, the deputy-marshal, on the 20th of May, 1826, sold the land to John Minor Botts for \$2020, payable in three equal annual payments, to wit:—in May, 1827, 1828, and 1829.

The land was regularly conveyed under an order of court. The deed of trust was executed to the said Anthony R. Thornton and William Carter, trustees, to secure the payment of the purchase-money, as it should fall due, to John Pegram, the marshal. The plaintiff's counsel agreed to the substitution of other property, the deed for which was executed December 1st, 1826. The first instalment, which fell due in May, 1827, not being paid, the property was sold on the 26th of November, 1827, on the following terms:—the amount of the first instal-

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ment to be paid immediately, the second in May, 1828, and the residue in May, 1829. Richard Anderson became the purchaser for \$1848, to be paid and secured as before stated. On the 23d of January, 1828, Richard Anderson paid, not only the instalment, which was then due, but also those which were payable at a future time, the trustees discounting legal interest. The trustees, thereupon, executed their joint deed, and signed the following memorandum:—"The payment for the within described lot of land, was made to us by Richard Anderson, in the following manner, on the 23d of January, 1828. Cash payment, due on the day of sale, November 26th, 1827, \$757 46. Bond due on the 20th of May, 1828, \$706 98; four months interest off, \$14 14; \$692 84: bond due May 20th, 1829, \$383 56: sixteen months' interest off, \$30 68; \$352 88; \$1803 18. Signed, Anthony R. Thornton and William Carter, trustees." On the 26th of January, 1828, the said Anthony R. Thornton, accounted with the plaintiff's attorney, for \$694 13, but has not accounted for the residue. The plaintiff was shortly afterwards informed by Henry L. Carter, administrator of Anthony R. Thornton, of the payment by the purchaser, Richard Anderson, to his intestate, on the 23d of January, 1828. Neither the plaintiff, nor his attorney, or the marshal, ever consented to such payment. The plaintiff, in his bill, insists that by joining in the receipt, William Carter enabled Anthony R. Thornton to commit a breach of trust, and is responsible, whether any portion of the purchase-money paid by Anderson was received by him or not: that Richard Anderson paid in his own wrong, and is also responsible. The marshal, the administrator of Anthony R. Thornton and William Carter, the surviving trustee, and Richard Anderson, the purchaser, are made parties defendants.

Henry L. Carter, administrator of Anthony R. Thornton, deceased, admits in his answer, that the whole money was paid to Anthony R. Thornton, who claimed the whole commission. There was no money in his hands at his death, except what stood to his credit in the bank of Virginia, \$334 28. He died on the 6th of February, 1828.



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Richard Anderson, the purchaser, insists on the right of the trustees to receive the money: That the credit was solely for the benefit of the purchaser, who might waive it. The only question respects the discount. Such would be the power of executors, and such is that of the trustees, who would receive the bonds and collect the money when due. Holding the bonds with the power to receive the money when due, necessarily implies a right to receive it at any time, and to surrender the bonds. This is still stronger than the common case, because the original decree directed the sale to be made by the marshal, and the money to be brought into court. Anthony R. Thornton and William Carter, made the sale, as deputies of the marshal, (who had no personal agency in it,) and took the deed of trust to themselves as trustees, to secure the payment of bonds, payable *on or before* a certain day. The sale at which this respondent purchased, was made for the payment of these bonds. The bonds which would have been required of him, had he not paid the money, would, probably, have been in the same form as to the trustees. In either case, the payment would have been legal, especially as the original decree directed the money to be brought into court. If, however, he should be held liable to the creditor, it must only be in the event of the insolvency of the trustees. He required a conveyance from both, and an acquittance from both, before payment. They stand equally bound to him, as the sureties against the claim of the creditor. He was not privy to the application of the money, to the use of either.

William Carter says, in his answer, that he had no knowledge of the deed of trust, except that Anthony R. Thornton held it up, saying, "here is a deed of trust, and I will make you a trustee," to which respondent assented:—That this defendant did not attend the sale:—That he admits the payment of the money to Anthony R. Thornton, and affirms that the respondent did not even receive a commission:—That he signed and acknowledged the receipt, without reading or inquiring about it, supposing that his signature was essential to the execution of

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the trust:—That he was indebted to Anthony R. Thornton for his office, and it was understood, that he was to act under his instructions, and to pay over to him the money received:—That he had the utmost confidence in Anthony R. Thornton, and believes that, had he lived, the affair would have been adjusted: That the money was received on the 23d of January; Anthony R. Thornton was taken sick on the 27th of January, and died on the 6th of February. William Carter contended, that as the bonds were payable to Pegram as marshal, his deputy had a right to collect them; his right being co-extensive with that of his principal. Throughout the business, Anthony R. Thornton frequently acted as deputy marshal. The decree of December, 1825, directed the marshal to sell, and under that decree, Anthony R. Thornton sold. So on the execution of the second deed from John M. Botts, Anthony R. Thornton acted both as marshal and trustee. The deed required, that on default of payment, the trustees should sell on the request of the marshal. The property was sold, he believes, without directions from Pegram. Thornton having, as deputy, the whole authority of principal, ordered the sale, and sold as trustee. That this defendant does not know whether the bonds were made payable to the marshal, or the trustees. If to the trustees, Thornton had a right to receive the money; if to the marshal, the recourse of the plaintiff is against Anderson.

The first deed of trust bears date, June 6th, 1826. It is made in trust, to sell on default of payment, at the request of Pegram, the marshal, in trust to pay the said Pegram, the sum or sums then due and unpaid, and the surplus, if any, the trustees are directed to retain in their hands, to be applied to the payment of bonds to become due. If, in the opinion of the trustees, a division of the property would be injurious, they are empowered to sell the whole for as much ready money as is due, and for the residue, on credits to meet the sums to become due; the property to remain bound in the hands of the purchaser, and the surplus of the purchase-money, if any, to be paid to John M. Botts.

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The second deed is dated December, 1826, substituting other property on precisely the same trusts.

The third deed bears date, 26th of November, 1827, from Anthony R. Thornton and William Carter, the trustees, conveying the whole property to Richard Anderson, in consideration of the whole purchase-money, the receipt of which is acknowledged.

MARSHALL, C. J.—This suit is brought by a creditor, claiming from the defendants a sum of money which this Court has decreed to him, and which he has not received.

In December, 1825, a decree was entered in his favour, against the original debtor, ordering a sale of lands which were subject to the debt, on a credit of one year, or on such further credit as the plaintiff's attorney might direct, taking a bond or a deed of trust from the purchaser, to secure the payment of the purchase-money. The marshal, John Pegram, acting by Anthony R. Thornton, his deputy, made the sale and took the bonds to himself as marshal, and a deed of trust to Anthony R. Thornton and William Carter, who were his deputies, specifying the times of payment, and stipulating that, in case of default, the trustees or the survivor, or his heirs, should, at the request of the said John Pegram, his executors, administrators, or assigns, sell, according to the terms of the deed. Default having been made in paying the first instalment, a sale was made by the trustees, and Richard Anderson became the purchaser. He paid the whole purchase-money, including the two instalments not then due, discounting from the amount, the legal interest on that part of the debt which was not due. The money was received by Anthony R. Thornton, who died soon afterwards insolvent. His liability for the money not being questioned, a decree was entered against his representative at a former term, reserving to the plaintiff the right to proceed against the other defendants, as to whom the cause was continued. That decree having been unproductive, the plaintiff now asks a decree against the other defendants.

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Three persons are now before the court, the creditor, the purchaser, and the surviving trustee, on one of whom the loss sustained, in consequence of the default of Thornton, must fall.

The creditor has proceeded in a regular course of law, to obtain his money; has given no authority to any individual which the law does not give, and has committed not a single act of indiscretion or irregularity, that has been shown to the court. The extension of credit on which the sale was made, under his first decree, which has produced no loss, and the selection of trustees to whom the trust property should be conveyed, if he did select them, constitute his whole agency, except as a plaintiff prosecuting his suit in court. His selection of, or assent to, the trustees, gave them no power not expressed in the deed, and their actions can affect him no farther than they have acted by his authority. If, then, the creditor has lost his debt, he must have lost it by the mere operation of law, or by a correct exercise by the trustees, of the authority vested by him in them.

If he has lost it by the operation of law, it must be because the money was paid according to the decree of the court. The decree orders the marshal to sell on a credit, "and to bring the proceeds of sale into court, to be disposed of by future order." Now, what are the proceeds of this sale? The decree directs that he shall "take bond with approved security, and deed of trust of the premises to secure payment of the purchase-money." These bonds are the immediate proceeds of sale, and the decree directs that they shall be brought into court to be subject to its future order. This implies no right in the officer to make any disposition of them, either to the debtor himself, or to any other person. If the term "proceeds" be construed to apply to future, as well as immediate proceeds, to the money secured by the bonds, as well as the bonds themselves, this does not dispense with the necessity of bringing the bonds into court, or confer a right on the officer to exercise over them any of the rights of ownership. As a matter of convenience, they may be permitted to remain in the hands of the officer; but as a matter of strict

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right, the creditor might, I presume, have required that they should be brought into court.

It seems to be agreed, that the bonds being taken to the marshal, he had a right to collect them, which right might consequently be exercised by his deputies.

I have felt some doubt on the propriety of making the bonds payable to the marshal. It is directed by no law. The decree does not specify the obligee, and I am not certain that the direction to take bond, implies that it shall be taken to the officer, rather than to the creditor. But passing over this difficulty, and supposing that, for the sake of convenience, there has been a general acquiescence under this practice, the marshal must be considered as a trustee for the creditor. He acquires no property in the bonds; no right of ownership over them; no power to dispose of them at his own will: he is a mere trustee. If empowered to collect them, he must collect them according to the trust. I do not mean to inquire, whether he exercises this trust by virtue of his office, or under an implied authority from the creditor. I am aware of the delicacy and consequences of this as a general question, and do not purpose to touch it; but will observe that these bonds are not taken to the marshal and his successors, but to John Pegram, marshal, &c., and to his executors, administrators, or assigns. Had the marshal been changed before the money was paid, could his successor, without an assignment, have acted on these bonds?

However this may be, whether his trust was personal or official, it is a trust, and ought to be faithfully executed.

It is argued, that the bonds are payable on *or before* the day mentioned in the condition, and that a consequent right existed in the obligor to pay, and in the obligee to receive the money, immediately.

The decree does not authorize the insertion of these words. The sale is to be made on credit, and bonds are to be taken for the payment of the purchase-money. It is the common formula, because an individual who is to receive money for himself, never objects to payment before the day. In trusts, it may be

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different. Payment before the day is never expected ; and if it may be made without the knowledge of the *cestui que trust*, his situation may be changed, often to his very great injury, without enabling him to provide for his safety.

But, admitting that the general direction to take bonds implies that they may be taken in the common form, and that this gives the debtor a right to pay before the day, it gives him a right to pay the whole debt, and the obligor a right to receive the whole debt, not a part of it. It gives no right to the one to purchase, nor to the other to sell the bonds for less than the sum mentioned in the condition. Such a transaction is not the exercise of any power conferred by the decree. If, then, this could be considered as an official act, it is an abuse of office ; it is a wrongful act, and can confer no rights in equity on those who are parties to it.

If the receipt of this money could be considered as an official act, the sureties of Thornton, if he gave any, would be responsible for it. I do not mean now to indicate any opinion on this question, if it be one, because I think General Pegram, whether officially or personally, was a trustee for the creditor, was known to all the parties as a trustee, and could not, by his own act, violate the trust for his own purposes. Consequently, that power could not be imparted to his deputies.

The creditor, then, has not lost his debt by the operation of law, and the responsibility of the parties before the court to him, is not changed by the circumstance, that the trustees were also deputies of the marshal. They acted as trustees, the debtor contracted with them as trustees, purchased from them as trustees, and paid the money to them as trustees. The casual circumstance, that they were also the deputies of the marshal, can no more avail him, than them. I proceed, then, to consider the transaction as one between a debtor and trustees, respecting a trust debt.

I do not think the case at all varied by the fact, that the deed of trust and bonds upon the second sale, were not executed. It is fairly to be presumed, that those instruments, had they been

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executed, if, indeed, a new deed of trust was required, would have conformed, precisely, to the deed of trust and bonds for which they were to be substituted.

The sale is made for the payment of a debt due to George W. Wallis. The terms are, partly for cash, and partly for credit. Bonds are directed to be taken for the payment of so much purchase-money as becomes due in future, secured by a deed of trust. The purchaser agrees with the trustees to pay the whole sum immediately, discounting legal interest, on which they convey the trust property, and give him a receipt in full for the purchase-money. Is this a fair, a legal, and an equitable execution of the trust?

Trustees must act conscientiously for the *cestui que trust*, and not for themselves. They have no right to divert the trust fund to their own use, and no man can relieve himself of his liabilities by assisting in such conversion. Had the whole purchase-money been paid, without discount, to the person authorized to receive it, the case would have been involved in much difficulty. It might have been supposed that the terms of the bond, authorized the purchaser to pay before the day, and compelled the obligee to receive the money. Even, then, any co-operation between the parties for the sole benefit of the trustee, would not receive the countenance of a court of equity. But this payment is not made to the obligee; it is made to the trustee, whose right to receive it, depends on the deed of trust. We must refer to the deed, then, for his power and his duty.

The deed does not authorize the trustees to sell under any circumstances, unless required to sell by Pegram. If required by him, they can only sell to raise so much of the purchase-money, as is then actually due, that is, so much as the obligee could recover by a suit at law. In one state of things only, can they sell the whole property, and that state of things, it is to be presumed, did actually occur. They did sell the whole property, but this right to sell, was not accompanied with the right to receive the purchase-money, which was to fall due in future. The language of the deed, after directing that the sale

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shall be for cash, so far as is necessary to pay the money actually due, is, "and as to the residue of the purchase-money, upon such credit as will meet the residue of the sum or sums to become due, the property to remain bound in the hands of the purchaser or purchasers, and to be sold, if he or they shall make default in the payment of any of the moneys that may thereafter be due and payable." The trust then requires, absolutely, that the property, if the whole be sold, shall remain bound in the hands of the purchaser for the money thereafter to become due. The trustees have a right to receive, only to the extent of the sale for cash; the property is to remain bound for the residue. They are empowered to receive that residue, only in the event of another sale for cash, which is not to be made until another instalment falls due, nor then, unless required by Pegram.

The terms of the trust, then, give no authority to the trustees to receive any part of the purchase-money, except that which arises from sales for cash; nor have they a right to make those sales unless required by the obligee. They are sedulously watched, and are not allowed to receive money, or to discharge the lien on the property, except at fixed times, when the fact of their receiving it must be known both to the obligee and to the creditor, and the attention of both must be drawn to it. They are not allowed to receive the money at a time when neither the obligee or the creditor have any reason to suspect the fact, or any opportunity of providing for their safety.

If the money was paid to trustees not authorized to receive, the liability, both of the purchaser, and of the trustees, to the creditor, cannot be controverted.

But if the authority of the trustees to receive, could be identified with that of the obligee; if the money, by the terms of the trust deed, as by the terms of the bond, had been made payable on or before the time specified in the deed, let me inquire, whether a court of equity ought to consider this as a valid payment.

It will not be contended, that a trustee can rightfully receive money which is well secured, in order to apply it to his own



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purposes. He can have no right to vary and increase the risk of his *cestui que trust*, in order to benefit himself. Such acts are breaches of trust, and, even if within the letter of his power, are deemed void.

In this case, the risk is varied and increased, without the knowledge or consent of the *cestui que trust*. A sum of money, which was amply secured, is collected by the trustee for his own use, and is held by him on his own personal security only. It is not collected for the *cestui que trust*, but for himself. Had he purposed to act for the *cestui que trust*, he would have consulted the interested party, or his counsel. But he acted notoriously for himself. This is undeniably a breach of trust.

Courts of equity, in the exercise of that vigilance which they employ for the protection of trusts, extend their control, not only over the acts of trustees, but over the acts of those also, who participate in the transaction; who aid and assist in the violation of the trust; who enable the trustee to violate it. All are made responsible for the act. In *Balfour v. Welland*, 10 Ves. 156, the Master of the Rolls said: "Where the act is a breach of duty in the trustee, it is very fit that those who deal with him, should be affected by an act tending to defeat the trust of which they had notice.

It is a general rule, that where the trustee does not act in pursuance of his trust, but in violation of it, even if he is within the letter of his power, those who co-operate with him, in enabling him to defeat the trust, are responsible for it.<sup>(1)</sup>

This case contains intrinsic evidence, that all the parties acted with full knowledge of the character of the transaction. The purchaser must have known, that Thornton intended the money for his own purposes. Receiving it on a discount of interest, was equivalent to borrowing it on interest. He could not have done this without intending to employ it.

(1) *Crane v. Drake et al.*; 2 Vern. 616. *Scott v. Tyler*; 2 Bro. Ch. Ca. 477. *Andrew v. Wrigley*; 4 Bro. Ch. Ca. 125-130. *Hill v. Simpson*; 7 Ves. 152. *Lowther v. Lord Lowther*; 13 Ves. 95. *M'Leod v. Drummond*; 17 Ves. 169.—[Editor.]

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The advance of money on a discount of legal interest, if to a person authorized to receive it, is, of itself, a perfectly fair, legal, and moral transaction. But, in regard to the power of these parties, it stands on the same ground with the discount of a larger sum. It is the purchase of a bond by a debtor from a trustee, for less than the sum mentioned in the condition, attended by this additional circumstance, that the trust property is to be exonerated from the lien which insured the debt, and the only security substituted for it, is the personal responsibility of the trustees. Under such circumstances, a court of chancery must consider the lien as subsisting in equity, and the purchaser as responsible to the creditor.

In argument, the counsel for the purchaser has likened this case to a payment made to an executor before it became due.

Had the money been payable to the trustees instead of the obligee, General Pegram, the cases would not, I think, stand on the same principles. An executor derives his power from the will, represents the testator in regard to the whole personal estate, and has an extensive discretion in its management. A trustee is strictly limited by the terms of the deed creating the trust, and has no power which it does not expressly give. But even in the case of an executor, the person who aids him in a breach of trust, does not act with impunity.

The purchaser and co-trustee, have both aided in this breach of trust; the purchaser, by advancing the purchase-money; the co-trustee, by that act which induced him to advance it. It is not to be believed, that Anderson would have advanced the money to Thornton, had not Carter joined in the conveyance and receipt.

The counsel for Carter insists, that he is not responsible, as the whole money was paid to his co-trustee. Had it been received in the fair and regular execution of the trust, the person who received it would have been solely responsible. All the cases which bear upon the point, have been adduced; the subject has been profoundly examined at the bar, and they prove clearly that in a fair transaction, one trustee is not liable for money

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received by his co-trustee, merely because he joined in the receipt.

But although Carter's act implies nothing disreputable in intention, his entire confidence in his co-trustee has betrayed him into an indiscretion, which, in a court of equity, is considered as co-operating in a breach of trust, and involving him in its consequences. The effect of his joining in the conveyance and receipt, was the payment of the money. He believed it safe in the hands of Thornton, but the substitution of Thornton's responsibility for the security which the decree provided, was a breach which a court of equity cannot countenance. It is a wrongful act, and he must bear the loss resulting from it.

I have never doubted the ultimate responsibility of both the purchaser and the co-trustee to the creditor. The only doubt which I have felt, regards the relation in which they stand to each other. Reflection has confirmed my first impression, that Carter, by signing the conveyance and receipt, has induced Anderson to pay the purchase-money, and has become surety for Thornton to him. I am therefore of opinion, that Carter is liable, in the first instance, to the creditor, and that Anderson is liable, eventually, on the insufficiency of Carter to pay the debt.

**DECREE.**—The decree heretofore rendered against the administrator of Anthony R. Thornton, who was primarily chargeable with the plaintiff's demand, having proved unavailing, and the court being of opinion, that the payment by the defendant, Richard Anderson, of the deferred instalments of the purchase-money, discounting interest, and the execution of the deed to him by the trustees, were unauthorized transactions; and that these deferred payments still remain due, and are chargeable on the trust property, but that the defendant, William Carter, by uniting with the other trustee, Anthony R. Thornton, in giving a receipt for the money, and executing the deed, is bound to indemnify the said Anderson, for the payment made by him, and should, therefore, be first made liable to the plaintiff, for the amount of the said deferred instalments, after deducting therefrom, so much of the trustees commission on the

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sales, as remains unpaid;—the Court therefore ordered and decreed, that William Carter should deposit in bank, to the credit of this cause, the deferred instalments, so far as they remained unsatisfied, with legal interest, from the dates at which they fell due respectively, and the plaintiff's costs. And the cause was retained in court, in order that the plaintiff might have a decree against the defendant, Anderson, and enforce his lien upon the trust property, if it should be necessary to the recovery of the money hereby decreed, or any part thereof.

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**DOE ON THE DEMISE OF LEWIS ET AL. V. BARKSDALE.**

Before Hon. JOHN MARSHALL, Chief Justice of the United States.  
Hon. PHILIP P. BARBOUR, District Judge.

In the construction of the *proviso* of the Act of Limitations, exempting persons under certain enumerated disabilities, from the operation of the act, who laboured under the disability "at the time of such right or title accrued," a subsequent disability cannot be tacked to one existing at the time, though both occurring in the same person, to prevent the statute from attaching.

Where there are several co-heirs, lessors of the plaintiff, in an action of ejectment, and joint and several demises laid in the declaration, and one of the co-heirs, who labours under no disability, fails to bring his action within the time limited by law, though *his* right of recovery will be barred by the act, it will not affect his co-heirs who were under disability. The proviso of the act is *personal*, and applies to all those who labour under any of the enumerated disabilities.

THIS was an action of ejectment brought in 1828, by the heirs at law of Mary Lewis, deceased, and others, claiming under them, against Rice Barksdale, to recover possession of a tract of land lying in the county of Albemarle, and state of Virginia. Joint and several demises from the heirs and their vendees, lessors of the plaintiff, were laid in the declaration. The defendant pleaded the general issue, confessed the lease, entry, and ouster, in the declaration supposed, and agreed to insist on

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the title, only, at the trial. The case is fully stated in the following special verdict, rendered at the November Term, 1830 :

“ We, the jury, find that the land in the plaintiff’s declaration mentioned, was the fee-simple estate of Mary Lewis, the wife of Hopkins Lewis, late of Albemarle county, in Virginia ; that the said Mary Lewis died intestate, in the year 1797, her husband, the said Hopkins Lewis, being then seised in right of his wife of the said lands ; that the said Hopkins Lewis, as tenant by the courtesy, remained seised thereof, until he departed this life before the year 1801. That at his death, the heirs of the said Mary Lewis, lessors of the plaintiff, became entitled by inheritance to the fee-simple estate, and possession of the land, which heirs were as follows, to wit : Nancy Lewis, born the 5th of August, 1782 ; John Lewis, born the 8th of November, 1783 ; Edward Lewis, born the 20th of September, 1785 ; Henderson Lewis, born the 10th of July, 1787 ; Granville Lewis, born January 10th, 1791 ; Polly D. Lewis, now Mary Russell, born January 8th, 1793 ; and Matthew Lewis, born February 13th, 1795, all of whom then resided in the commonwealth of Virginia. That on the 3d of November, 1801, four of the aforesaid heirs, to wit : Nancy, John, Edward, and Henderson, made choice of a certain Matthew Henderson as their guardian, who was thereupon appointed as such by the county court of Albemarle, &c.

“ That in the month of February, 1806, two other of the said heirs, to wit, Granville and Matthew Lewis, made choice of a certain Micajah Clarke as their guardian, who was accordingly appointed such by the county court of Campbell, in the commonwealth of Virginia, &c.

“ That from the time of the death of the said Hopkins Lewis, till possession was taken of the land aforesaid, by Samuel Barksdale, in manner hereinafter stated, the actual possession thereof, was in tenants for years, which tenants acknowledged the title of the said heirs, it not appearing to the jury that the guardians aforesaid, ever took actual possession of the said land, or did any act in relation to it, except to sell the same as is hereinafter mentioned.

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"That the aforesaid Polly D. Lewis, had no guardian shown to this jury.

"That some time in the year 1806, the aforesaid Matthew Henderson, and Micajah Clarke, sold the said land, in fee-simple, to the aforesaid Samuel Barksdale, and bound themselves personally, giving a certain John Clarke as their surety, to make to the said Samuel, a good title to the land aforesaid, but no deed or instrument in writing, from the said Micajah Clarke, Matthew Henderson, and John Clarke, or either of them, to the said Samuel Barksdale, was produced, or proved to the jury to have been executed. That in pursuance of the said sale, the said Samuel Barksdale, took possession of the land aforesaid, at Christmas, in the year 1806, and not before. That from the time the said Samuel Barksdale took possession, up to the present time, he, by himself, and his son, the present tenant, and the defendant in this action, has held the actual possession thereof, claiming it as his own property, under the sale aforesaid, and quietly enjoying it as his own.

"That from the time the said Barksdale took possession as aforesaid, until the institution of this suit, no demand for the delivery of the possession of the said land was made by any of the lessors of the plaintiff, and no ouster was proved to have been made, previous to the institution of this suit.

"That at the time when the said Samuel Barksdale took possession of the land as aforesaid, the said heirs of Mary Lewis were all absent from this commonwealth, and living in the state of Kentucky, except Polly D. Lewis, now Mary Russell, who was then in this commonwealth, and did not leave it until some time in the year 1807. That at the time of the taking possession aforesaid, all the heirs of Mary Lewis were of full age, except the four younger of them, to wit: Henderson, Granville, Polly, and Matthew, who were then under twenty-one years of age, and minors. That the said heirs have all constantly resided in the state of Kentucky, and been absent from this commonwealth from the periods of their respective removals as aforesaid.

"That all the minors aforesaid, attained their full age of twen-

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ty-one, more than ten years before the commencement of this action.

"That while the said Samuel Barksdale was in the actual possession of the land aforesaid, claiming it as his own, under the aforesaid contract with Micajah Clarke and Matthew Henderson, three of the aforesaid heirs, to wit: Henderson Lewis, Edward Lewis, and Matthew Lewis, executed their several deeds of bargain and sale, for the purpose of conveying their respective interests in the land, to James R. Russell and Bennett Henderson respectively, two of the lessors of the plaintiff.

"That the said Matthew Lewis after the execution of his deed, and before the institution of this suit, departed this life, intestate, leaving his aforesaid brothers and sisters his heirs.

"We further find the several leases, entries, and ousters in the declaration alleged, and the possession of the defendant Rice Barksdale.

"And, if, upon the foregoing facts, the plaintiff hath title to recover, in this action, upon any or all of the demises in the declaration, the whole, or any part of the land in the declaration mentioned, then, upon such of the said demises as the plaintiff is entitled to recover on, and as to the whole of the land, or so much thereof as he, upon the facts aforesaid is entitled to recover, we find the defendant guilty in manner and form as the plaintiff has declared against him, and assess the plaintiff's damages by occasion thereof, at one cent. But if the plaintiff be not entitled to recover upon any of the said demises, then we find for the defendant."

The Court, (MARSHALL, C. J., and P. P. BARBOUR, J.), took time until the next term, to consider the questions of law arising on this special verdict, and at the May Term, 1831, the opinion of the Court, (consisting of the same judges), was delivered as follows, by

MARSHALL, C. J.—This is an ejectment brought by seven coparceners, to obtain possession of a tract of land, of which their ancestor died seised. The original title of the lessors of the

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plaintiff, is not controverted. The defendant resists the claim under an adversary possession of more than twenty years.

Mary Lewis died, seised in fee of the premises, in the year 1797, intestate, leaving seven children, the lessors of the plaintiff, her heirs at law. The premises remained in the possession of her husband, as tenant by the curtesy, until his death, which happened previous to the year 1801. Matthew Henderson was appointed guardian to four of the heirs, and in the year 1806, Micajah Clarke was appointed guardian to two others of them. In the year 1806, Matthew Henderson sold the land to the defendant, who took possession thereof on the 25th of December, 1806, and has held quiet possession until the institution of this suit, claiming to hold the premises as his own property, in fee simple, under the said sale. No deed of conveyance was exhibited, but a bond, in which the said Henderson and Clarke bound themselves with a surety, to make a good title, was relied on by the defendant.

On the 25th of December, 1806, six of the infant heirs, for whom guardians had been appointed, were in the state of Kentucky, where they remained until the institution of this suit. Mary Lewis, now Mary Russell, one of the lessors of the plaintiff, who was also an infant, was at that time in Virginia, but removed to the state of Kentucky some time in the year 1807.(1)

(1) The *proviso* of our act, limiting the right of entry into lands, tenements, or hereditaments, to twenty years after such right shall have accrued, declares, "that if any person or persons entitled, &c., shall be, or were, under the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or not within this commonwealth at the time of such right or title accrued, or coming to them, every such person, and his, or their heirs, shall, and may, notwithstanding the said twenty years are, or shall be expired, bring, and maintain his action, or make his entry within ten years next after such disabilities removed, or the death of the person so disabled, and not afterwards." (1 R. C. of 1819, pp. 487, 488, secs. 1, 2; Tate's Digest, 407.) But the Act of March 8th, 1826, (Sess. Acts, 1825, 1826, p. 25, sec. 3.) repealed the saving, as to persons *not within the commonwealth* at the time when their right, or title to any action, or entry accrued: and the Act of February 5th, 1831, changed the limitation of the right of entry, from *twenty to fifteen* years, and the saving in favour of persons under disability from *ten: years to five:* and the



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The plaintiffs, each of them, attained their age of twenty-one years, more than ten years before the institution of this suit. A joint demise, and also several demises from each of the heirs; are laid in the declaration.

Had the lessors of the plaintiff been seised in severalty of the same property, and been placed under precisely the same circumstances in every other respect, no doubt could exist in the case. On the 25th of December, 1806, when the cause of action accrued, Mary Lewis, now Mary Russell, was an infant, residing within the commonwealth of Virginia, and came within that exception of the statute only, which saves the rights of infants. Pending this disability, she removed out of the country, and has continued out of it until the institution of this suit. But it is admitted that one disability cannot be tacked to another, and, consequently, the right of this party is the same as if she had remained within the state.(2) The statute preserves her

same act repealed so much of the Act of March 8th, 1826, as applies to real, or mixed actions. (Sess. Acts of 1830, 1831, p. 98, secs. 1, 2, 3.)—[*Editor.*]

(2) It is worthy of remark, that Mr. Blanshard, in his *Treatise on the Statutes of Limitation*, pp. 18, 19, Law Library, Vol. I, lays down this doctrine of tacking disabilities, somewhat differently. He says, that if there are successive disabilities in the *same person*, on whom the right first descended, the statute "will not begin to run against him till he shall be free from disability; and successive disabilities, without any intermission, will continue to him a protection against being barred by non-claim; but any cessation of disability, will call the statute into operative force, and no subsequent disability will arrest the bar produced by the statute:" citing 2 Preston on Ab. of Tit. 340. "But it has been said," he continues, "that if, before one disability cease, another commences in a *different person*; as if a right of entry accrue to a *feme covert*, and she die, leaving her heir within age, or the like, the statute does not begin to run until after the latter disability ceases." In support of this latter proposition, he cites *Cotterell v. Dutton*, 4 Taunt. 826, and *Archbold's Pleading*, 27. It will be observed, that the opinion of Chief Justice Marshall, is directly opposed to the doctrine laid down by Mr. Blanshard, even where the successive disabilities occur in the *same person*. In the above case, there were successive disabilities in the *same person*, yet the party was held to be barred by the statute, the disability of infancy, which alone existed at the time of the right of entry accrued, having ceased more than ten years before action brought, though pending the first disability, another attached, and continued up to the institution of the suit. Mr. Blanshard does not adduce the authority of any *adjudged case*, in support of his doctrine in the case first put, and

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right of action, for ten years after she has attained her age of twenty-one years. That time having expired, she would be no longer within its saving.

The other six plaintiffs were out of the commonwealth, when the cause of action accrued, and have continued out of it until the institution of this suit. Consequently, they are not barred by the act. If, then, the plaintiffs claimed in severalty, it would be clear that six of them would be entitled to recover, and that the defendant would retain the seventh part of Mary Russell.

the opinion of the Chief Justice is certainly more consonant with the phraseology of both the English, and American statutes. Our statute declares—and the statute of 21 Jac. 1, ch. 16, sec. 2, uses equivalent terms—that if the persons entitled to such right of entry, &c., *shall be, or were, under any of the enumerated disabilities, "at the time of such right, or title accrued, or coming to them, &c."* Now, the sound construction of this language would seem to require, that the statute should be considered as beginning to run from the time that the right of entry, &c., accrued, *as to all disabilities commencing at a posterior time.* A subsequent disability, though succeeding "without intermission," and in the *same* person, one existing *at the time*, is without the pale of the letter of the act, and to *tack* them, would seem to go far to contravene the *policy and spirit* of the law, in creating statutes which were designed, in the language of Mr. Brougham, to "repair the ravages committed by time upon the evidence of human rights," and which have been aptly and emphatically termed, *statutes of repose.*

Since the preceding part of this note was prepared, the Editor has examined a case decided by the Supreme Court of Pennsylvania in 1821, which entirely sustains the view, which he has ventured to advance above. In that case, ejectment was brought by two female heirs. Both were infants when their title accrued, both were married before they attained their majority, and so continued when the action was brought, and more than ten years had elapsed since they came of age. The Pennsylvania statute, like that of Virginia, is taken almost *verbatim*, from the English statute of 21. Jac. 1, ch. 16. Tilghman C. J. said: "The ten years are to be counted from the time of the ceasing or removing of the disability *which existed when the title first accrued.* If other disabilities, *accruing afterwards,* were to be regarded, the right of action might be saved for centuries. The descent of the title upon infant females, and the marriage of those females under the age of twenty-one, might succeed each other, *ad infinitum.*" The Court held, that the plaintiffs were barred by the act. Thompson et al. v. Smith, 7. Serg. and Rawle, 209. In conformity with this decision, are the cases of Eager and wife v. The Commonwealth, 4. Mass. Rep. 182. Demarest v. Wynkoop, 3 John. Ch. Rep. 129. Jackson *ex dem* Roosevelt et al. v. Wheat. 18 John. Rep. 40. The case of Eaton v. Sandford, 2. Day, 523, is *contra*, but the law does not seem to be settled in Connecticut. Opinion of Smith, J., in Bush v. Bradley, 4 Day, 298.—[Editor.]

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If this were an original question, I should feel much difficulty in so construing the first and second sections of our act of limitations, as to exclude one co-heir from the exception in his favour, in consequence of the omission of another to assert his right within the time, to which it is limited. The proviso of the act, appears to me, to be in favour of each individual who comes within it. It is personal. It applies to him who labors under the disability. It is made in consequence of that disability; and, it seems to me, that the intention of the act would be defeated by a construction, which denies the benefit of the saving, to an individual coming within its words, or would give that benefit to an individual not coming within them.

Both the plaintiffs and defendant, however, insist, that this rule does not apply to the case at bar.

The counsel for the plaintiffs contends, that the guardians of those infants, to whom guardians had been assigned, had a right to lease the lands during the infancy of their wards; that Barksdale must be considered as coming into possession under the title which the guardians had a right to make, and as being tenant in common with Mary, the coparcener, who had no guardian, and whose right, the guardians of the other infants could not pass, and, that an adversary possession against Mary, cannot be presumed.

The law respecting the possession of one coparcener, or tenant in common, as against co-tenants, is certainly as it has been laid down. But Mr. Barksdale did not enter under a lease, nor did he, so far as we are informed by the verdict, acquire the possession under Henderson and Clarke, as guardians. He purchased from them an absolute title, in fee simple, entered on the premises in virtue of that title, and held the same as his property. It is admitted, that this is evidence, on which the jury might have found an adversary possession, and on which the court might have instructed the jury so to find; but, as the jury has not found the adversary possession, the court, it is said, cannot presume it. But the jury have not found the tenancy in common, and Mr. Barksdale certainly did not enter as a tenant

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in common. The argument, too, is founded on the idea, that adversary possession was a technical phrase, which it was necessary to find in terms. The act does not use the term, and I am not satisfied that such is the law. Equivalent terms may bring the possession within the act; and this verdict does find a possession, which must be adversary. It finds that the vendee took possession under the sale, and has continued in possession ever since, claiming the land as his own property. The verdict does not inform us that Henderson and Clarke acted in the character of guardians, and the sale was certainly one which, as guardians, they could not make rightfully.(3) I do not, then, consider the general law, which is applicable between coparceners, or tenants in common, as applying in this case.

The counsel for the defendant contends, that the lessors of the plaintiff constitute but one heir, and that as one of them is barred by the act of limitations, all are barred. As one of them cannot be brought within the savings of the act, those who do come within it, cannot avail themselves of the exception in their favour.

It has already been said, that this construction would defeat the obvious intention of the act. A person, whose right is expressly saved for his own benefit, would be deprived of that right by the negligence of another, over whom he had no control. One of the coparceners might have been of full age when the cause of action accrued, so that as to him, the time would run from the entry of the defendant. The exception, then, in favour of the parties, in whose favour the exceptions are made, would be of no avail. According to the principles maintained by the defendant, as they are understood, no partition could be made by the coparceners while out of possession. Their deeds are mere nullities, under the act prohibiting conveyances of pretended titles. This construction would certainly defeat the in-

(3) To constitute an adversary possession, the possession must be coupled with a *claim of title*. Without such claim of title, no naked possession, however long continued, will be considered adversary, and it will constitute no bar to those having the real title. *Smith v. Burtis*, 9 John. Rep. 180.—[*Editor*.]

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tention of the law. If it could be sustained, the separate demises laid in the ejectment would be erroneous, for one joint demise only could be sustained. But, although the title be joint, the interest is, to every intent and purpose, several, and does not survive. In reason, then, it would seem, that each coparcener might recover his separate interest. The case of (*Roe dem. Langdon et al. v. Rowleston*, 2 Taunton 440), is the very case, and must be declared not to be law, on the principles for which the defendant contends.

The cases cited from 4 Term. Rep.(4) and 7 Cranch,(5) are not applicable to this. They were decided, not upon the rights of the parties, but the form of the pleading. The parties pleaded jointly, and their plea was good or bad in the whole. The Court must either have determined that a party, not within the exception, was brought within it by being joined with a person entitled to its benefits, or, that a person really within it, must lose its benefit, by having joined in the plea with a person not entitled to the protection of the bar. The plea was not good as to the person who could not bring himself within the exception, and being bad in part, was, on technical legal principles, declared to be bad in the whole. But this technical rule does

(4) *Perry et al. v. Jackson et al.* 4 Durn. & E. 516.—[Editor.]

(5) *Marsteller et al. v. McClean*, 7 Cranch, 156.—Action for meane profits by several plaintiffs against the defendant, after a recovery in ejectment. Defendant pleaded statute of limitations, and plaintiffs replied, that two of the plaintiffs "were *femes covert*, when the cause of action accrued, and have ever since continued *femes covert*,"—that another of the plaintiffs "*was a feme covert*,"—and that all the other plaintiffs were infants at the accrual of the action, and were still so at the commencement of the action. General demurrer and joinder to this replication. *Per the Supreme Court.* A replication should, of itself, contain a full and complete answer to the bar, and a joint plea, which is bad, affects, with its consequences, all the parties joining in it. Here, it might be true, that the *third* plaintiff "*was a feme covert*;" and yet, five years might have elapsed since the disability ceased. The rule was settled, that *all* the plaintiffs in a joint action must be competent to sue, citing and approving, *Perry et al. v. Jackson et al.* 4 D & E. 516, where it was held that a plea of the statute of limitations, which was good as to one partner, barred them both in a joint action. Demurrer to the replication sustained.—[Editor.]

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not apply to this case. The lessors of the plaintiff, claim distinct rights, under separate demises. Nothing, in the form of the pleading, restrains the court from diciding according to the rights of the parties. The judgment, then, should be according to the legal rights of the parties; that the plaintiff recover six-sevenths of the land in the declaration mentioned; and that judgment, as to the other seventh, be entered for the defendant.

**JUDGMENT.**—This day came the parties, &c., and the matters of law arising upon the special verdict in this cause, having been argued, it seems to the Court here, that the plaintiff is entitled to recover his term, yet to come of, and in, six-sevenths of the messuage and land in the declaration mentioned; and that he is not entitled to recover his term in the remaining seventh. Therefore, it is considered, &c., that the plaintiff recover against the defendant his term yet to come of, and in, six-sevenths of the messuage and land in the declaration mentioned, together with one cent, the damages by the jury assessed, and his costs, &c. And a writ is awarded the plaintiff, to the marshal of this district to be directed, to cause him to have possession of his term yet to come of, and to six-sevenths of the messuage and lands aforesaid.

# **Circuit Court of the United States.**

**VIRGINIA, NOVEMBER TERM, 1833.**

**REPORT**

**Hon. JOHN MARSHALL**, Chief Justice of the United States.  
**Hon. PHILIP P. BARBOUR**, District Judge.

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## **EX PARTE ROBERT B. RANDOLPH.**

A party was arrested and held in custody, by virtue of a distress warrant, issued from the treasury department, under an act of Congress passed the 15th of May, 1820, "to provide for the better Organization of the Treasury Department." The act provides in substance, for the issuing of this warrant by the agent of the treasury, against all military and naval officers, &c., charged with the disbursement of the public moneys, who shall fail to pay and settle their accounts at the treasury department. The party now in custody, was a lieutenant in the navy of the United States, and had officiated as acting purser of a national ship, supplying a vacancy occasioned by the death of the regularly commissioned purser of the ship, on the Mediterranean station, and had executed no official bond as purser. On his return to the United States, he had settled his account at the proper department, viz., in 1828; and in 1833, the then fourth auditor, opened and re-stated his account, on the ground that it had been erroneously settled in the first instance, and the account, as re-stated, exhibited a large balance against the party, due to the United States. Upon this re-stated account, the distress warrant was issued, by virtue whereof, the party was arrested and was brought up

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under a writ of *habeas corpus*, directed to the officer, who executed the warrant and held the petitioner in custody. *Held*:

1. That the account of the petitioner as acting purser, having been once stated, and settled at the treasury department, the law invests the auditor with no power to open and re-settle it, of *his own mere authority*. The act creates a special and limited jurisdiction, and after the accounts of any of the class of officers on whom it was intended to act, have been adjusted, however erroneously, that special jurisdiction is *functus officio*, and any process issued upon a re-settlement of such accounts, is absolutely *null and void*. Per Barbour, J.
2. That the act of Congress authorizing the writ of *habeas corpus* to be issued, "for the purpose of inquiring into the cause of commitment," applies as well to cases of commitment under *civil* as to those under *criminal* process. *Ib.*
3. That the decision of a question involving the *constitutionality* of an act of Congress, is one of the gravest and most delicate of the judicial functions, and while the court will meet the question with firmness, where its decision is indispensable, it is the part of wisdom, and a just respect for the legislature, renders it proper, to waive it, if the case in which it arises, can be decided on other points. *Per Curiam*.
4. That, assuming that the act, under which this arrest was made, does not violate the Constitution of the United States, which declares, that "the *judicial power* of the United States, shall be vested in one supreme court, and in such inferior courts as Congress shall from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour," and extends the judicial power to "controversies to which the United States shall be a party;" yet, the authority vested by this law in certain agents of the treasury, and all acts done in pursuance thereof, are *purely ministerial*. The statement or certificate, authorized by the act, is not a *judgment*, and the warrant which coerces payment, is not *judicial process*. They are *ministerial acts*, (for, otherwise, they could not be sustained,) and the general principles of construction require, that the authority vested by the act, shall be strictly and literally pursued. Per Marshall, C. J.
5. That the act does not apply, in sound construction, to every commissioned officer of the army or navy of the United States, to whose hands any public money may be entrusted, but only to those regularly appointed disbursing officers, who have given official bonds, with sureties for the faithful discharge of the duties of their office; it does not embrace a mere *acting purser* in the navy.—*Ib.*
6. That the construction put by the court upon this act, does not affect the *responsibility* of a temporary *acting* disbursing officer of the army or navy, but simply denies his *liability to the particular process authorized by the act*. The *responsibility* of such an officer, is precisely the same, with that of the regularly appointed officer, who has given his official bond with surety, and if his account has been erroneously settled, it may be opened, and any balance remaining due from him to the United States, may be recovered in a regular course of legal proceeding. *Per Curiam*.



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7. That in case of an erroneous settlement, a bill in equity would lie to surcharge and falsify, as in the case of a settled account between individuals; and *quære*, if even *at law*, though the settled account would be *prima facie* evidence, the true balance might not be recovered upon proving mistakes and omissions?—  
Per Barbour, J.

THE petitioner, Robert B. Randolph, was brought into court by virtue of a writ of *habeas corpus*, directed to the marshal of the Eastern District of Virginia, requiring him to have the body of the petitioner, late acting purser of the United States frigate Constitution, and who was detained under the custody of the marshal, together with the cause of his being taken and detained, before the judges of this Court. The writ was issued on the 3d of December, 1833, and was made returnable on the following day.

The marshal, in his return, stated that, before the service of the writ of *habeas corpus*, there was a certain warrant sent to him by the solicitor of the treasury of the United States, against the goods and chattels, lands, tenements, and hereditaments, and the body, of Robert B. Randolph, late acting purser of the United States frigate Constitution, for a certain debt due by the said Randolph to the United States, by an account stated, which account stated, was sent by the solicitor along with the warrant; that not finding goods and chattels of the said Robert B. Randolph to satisfy the debt, he arrested and took his body into custody, in obedience to the mandate of the warrant, on the 13th day of November, 1833: that these were the causes of the arrest and detention of the said Robert B. Randolph, whose body he had ready, as by the writ of *habeas corpus*, he was commanded.

The warrant and the stated account referred to by the returning officer, were annexed to the return. The warrant was in the following words:—"Edmund Christian, Esq., United States Marshal for the Eastern District of Virginia:—Whereas, Robert B. Randolph, late acting purser of the United States frigate Constitution, stands indebted to the United States, in the sum of \$25,097 83, agreeably to the settlement of his ac-

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count, made by the proper accounting officers of the treasury, a copy of which is herewith enclosed: And, whereas, the said Robert B. Randolph, having failed to pay over, according to the act of Congress passed the 15th day of May, 1820, entitled, 'An act to provide for the better Organization of the Treasury Department,' the said sum of \$25,097 83: These are, therefore, in pursuance of the said act, to command you to proceed immediately, to levy and collect the said sum of \$25,097 83, by distress and sale of the goods and chattels of the said Robert B. Randolph, giving ten days' previous notice of such intended sale, by affixing an advertisement of the articles to be sold, at two or more public places in the town or county, where the said goods and chattels may be taken, or in the town or county where the owner of such goods and chattels may reside; and should there not be found sufficient goods and chattels to satisfy the said sum of \$25,097 83, remaining due and unpaid as aforesaid, you are hereby commanded to commit the body of the said Robert B. Randolph to prison, there to remain until discharged by due course of law. And should the said Robert B. Randolph be committed to prison, as aforesaid, or if he abscond, and goods and chattels sufficient to satisfy the said sum of \$25,097 83 be not found, you are hereby further commanded, to levy upon, and expose to sale at public auction, for ready money, to the highest bidder, the lands, tenements, and hereditaments of the said Robert B. Randolph, or so much thereof as may be necessary to satisfy the said sum of \$25,097 83, or whatever sum there may remain due and unpaid, after you shall have given notice of said sale, for at least three weeks prior to its taking place, in not less than three public places in the county or district where such real estate is situate. And all moneys which may remain of the proceeds of such sales, after satisfying the said sum of \$25,097 83, and paying the reasonable costs and charges of the sale, you are required to return to the proprietor or proprietors of the land, or real estate sold as aforesaid. And, whatever you may do in obedience to this warrant, make return thereof to this office, and for

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your so doing, this shall be your sufficient authority. (Signed)  
V. Maxcy, Solicitor of the treasury.”(1)

(1) It is essential to the proper understanding of this anomalous proceeding against Robert B. Randolph, that the 2d and 3d sections of the act on which it is founded, should be inserted entire. They are as follows:

“Sec. 2. That from and after the 30th day of September next, if any collector of the revenue, receiver of public money, or other *officer*, who shall have received the public money before it is paid into the treasury of the United States, shall fail to render his account, or pay over the same, in the manner, or within the time, required by law, it shall be the duty of the *first* comptroller of the treasury, to cause to be stated, the account of such collector, receiver of public money, or other *officer*, exhibiting *truly*, the amount due to the United States, and certify the same to the *agent* of the treasury, who is hereby authorized and required to issue a warrant of distress against such delinquent *officer and his sureties*, directed to the marshal of the district in which such delinquent *officer and his surety or sureties* shall reside; and where the said *officer, and his surety or sureties* shall reside in different districts, or where *they or either of them*, shall reside in a district other than that in which the estate of *either* may be situate, which may be intended to be taken and sold, then such warrant shall be directed to the marshals of such districts, and to their deputies, respectively; therein specifying the amount with which such delinquent is chargeable, and the sums, if any, which have been paid. And the marshal, authorized to execute such warrant, shall, by himself or by his deputy, proceed to levy and collect the sum remaining due, by distress and sale of the goods and chattels of such delinquent *officer*, having given ten days' previous notice of such intended sale, by affixing an advertisement of the articles to be sold at two or more public places in the town or county where the said goods or chattels were taken, or in the town or county where the owner of such goods or chattels may reside; and if the goods and chattels be not sufficient to satisfy the said warrant, the same may be levied upon the person of such *officer*, who may be committed to prison, there to remain, until discharged *by due course of law*. Notwithstanding the commitment of such *officer*, or if he abscond, or if goods and chattels cannot be found sufficient to satisfy the said warrant, the marshal or his deputy may, and shall proceed to levy and collect the sum which remains due by such delinquent *officer*, by the distress and sale of the goods and chattels of the *surety or sureties of such officer*, having given ten days' previous notice of such intended sale, by affixing an advertisement of the articles to be sold, at two or more public places in the town or county where the said goods or chattels were taken, or in the town or county where the *owner* of such goods or chattels resides. And the amount due by any such *officer*, as aforesaid, shall be, and the same is hereby declared to be, a lien upon the lands, tenements, and hereditaments, of such *officer and his sureties*, from the date of a levy in pursuance of the warrant of distress issued against *him or them*, and a record thereof made in the office of the clerk of the district court of the proper district, until the same shall be discharged

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The stated account which was the basis of the warrant, was also annexed to the marshal's return. It purports to be a resettlement of Robert B. Randolph's account, as acting purser of the frigate, *Constitution*; the former account, as was alleged,

according to law. And for want of goods and chattels of such *officer*, or *his surety or sureties*, sufficient to satisfy any warrant of distress issued pursuant to the provisions of this act, the lands, tenements, and hereditaments, of such *officer*, and *his surety or sureties*, or so much thereof as may be necessary for that purpose, after being advertised, for at least three weeks, in not less than three public places, in the county or district where such real estate is situate, prior to the time of sale, may, and shall be sold by the marshal of such district or his deputy; and for all lands, tenements, or hereditaments, sold in pursuance of the authority aforesaid, the conveyance of the marshals or their deputies, executed in due form of law, shall give a valid title against all persons, claiming under such delinquent *officer*, or *his surety or sureties*. And all moneys which may remain of the proceeds of such sales, after satisfying the said warrant of distress, and paying the reasonable costs and charges of the sale, shall be returned to such delinquent *officer*, or *surety*, as the case may be: *Provided*, That the summary process herein directed shall not affect any *surety* of any *officer* of the United States, who became bound to the United States before the passing of this act; but each and every such *officer* shall, on or before the 30th day of September next, give new and sufficient *sureties* for the performance of the duties required of such *officer*.

"Sec. 3. That, from and after the 30th day of September next, if any *officer* employed, or who has heretofore been employed, in the civil, military, or naval departments of the government, to disburse the public money appropriated for the service of those departments, respectively, shall fail to render his accounts, or to pay over, in the manner, and in the times, required by law, or the regulations of the department to which he is accountable, any sum of money remaining in the hands of such *officer*, it shall be the duty of the first or second comptroller of the treasury, as the case may be, who shall be charged with the revision of the accounts of such *officer*, to cause to be stated and certified, the account of such delinquent *officer*, to the agent of the treasury, who is hereby authorized and required immediately to proceed against such delinquent *officer*, in the manner directed in the preceding section, all the provisions of which are hereby declared to be applicable to every *officer* of the government, charged with the disbursement of the public money, and to their *sureties*, in the same manner, and to the same extent, as if they had been described and enumerated in the said section: *Provided*, nevertheless, That the said agent of the treasury, with the approbation of the secretary of the treasury, in cases arising under this or the preceding section, may postpone, for a reasonable time, the institution of the proceedings required by this act, where, in his opinion, the public interest will sustain no injury by such postponement."—3 Story's Laws U. S., ch. 107, pp. 1791-1793.

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having been settled erroneously, and the errors and omissions in the former account being corrected in the re-stated account. The resettled account, composed for the most part of items, which had, on the former settlement been allowed as credits, exhibited a balance against Robert B. Randolph, of \$25,229 17 “being for money received by him, at Port Mahon, on or about the 3d of April, 1828, for which he has not accounted, for slop clothing, and German linen, for which he claimed, and has obtained, an erroneous credit in the settlement of his account, and per advances to the officers and men of the frigate Constitution, for his pay roll; as it appears that *portions of said advances were made out of the money and stores of purser Timberlake, and other portions out of the ship's stores, for which he, (Lieutenant Randolph,) has not accounted; it being impossible for any one, except himself, to separate the items,* as it appears from the statement and vouchers herewith transmitted for the decision of the second comptroller of the treasury thereon.” The account was certified by Amos Kendall, fourth auditor, and also by J. B. Thornton, second comptroller of the treasury. There is an unexplained discrepancy between the re-stated account and the warrant, the account claiming \$131 34, more than the warrant. This discrepancy, however, does not seem to have attracted the attention, either, of the court or the counsel.

The case was argued by Mr. Robertson, late attorney-general of Virginia, and Mr. Leigh, on behalf of the petitioner, and by Mr. R. C. Nicholas, on the part of the United States.

Mr. Robertson said, that as Mr. Nicholas had consented to appear on behalf of the United States, he would now present to the court two documents, that morning received from Washington: they were authentic copies of the accounts of Lieutenant Randolph and of John B. Timberlake, as settled at the treasury, respectively, in 1828 and 1829.

Before going into the argument, he would inquire, whether the counsel representing the United States would admit a fact which he considered important to the justice of the case, and

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believed to be one of general notoriety: That Lieutenant Randolph had never been duly appointed purser, but had temporarily acted in the place of the deceased purser, Timberlake, in pursuance of the verbal order of his commanding officer?

Mr. *Nicholas* observed, that he appeared in the case at the request of the Court, as *amicus curiæ*, and did not feel himself at liberty to make any admissions.

Mr. *Robertson* said, he should then insist that the fact sufficiently appeared from the evidence in the case; but if not, that the burden of proof rested on those by whom Lieutenant Randolph had been imprisoned, to show that he was an *officer*, within the meaning of the law under which the arrest had been made.

He would now proceed to lay before the court, the grounds upon which he considered the petitioner entitled to his discharge, under the *habeas corpus* heretofore awarded.

The first position he should endeavour to maintain was, that the act of Congress, under colour of which Lieutenant Randolph had been deprived of his liberty, was unconstitutional, null, and void.

Mr. *Robertson* said, when we looked to the Constitution of the United States, we could not fail to be struck with its multiplied provisions for the security of personal rights. Its framers sought, as far as possible, to guard against all abuses of power. With that view, they had secured to the citizen, the privilege of the writ of *habeas corpus*.

They had forbidden *ex post facto* laws, and bills of attainder; laws abridging the freedom of religion, of the press, and of speech.

In all criminal prosecutions, they had provided for the accused, a speedy trial before an impartial jury: and had declared that no man should be deprived of life, liberty, or property, without due process of law.

He adverted to these provisions of the Constitution,—there

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were others equally strong, and more directly apposite to the question before the court, which would be the subject of special notice—as evincing the deep anxiety of its framers, to protect the people against the oppression of the government. Vain, indeed, had all their efforts proved, if the proceedings, now under the view of the court could be upheld, and an American citizen, without a judicial trial, subjected, for any cause, to perpetual imprisonment, by the mandate of a subordinate executive officer.

Among the means adopted to attain the great object in view, was the separation, with some few exceptions, of the legislative, executive, and judicial, departments. By article 2, section 1, it was declared that the *executive* power should be vested in a president of the United States. By article 3, section 1, that the *judicial* power should be vested in one supreme court, and such inferior courts, as Congress might ordain and establish; and that the judges should hold their offices during good behaviour. The second section of the same article, declares that the judicial power shall extend to all cases in law or equity, arising under the constitution and laws of the United States; and still more definitely, “*to controversies to which the United States shall be a party.*”

Does not the law, in question, confer judicial powers on the executive, and give to that department the decision of controversies, to which the United States are a party? It authorizes a comptroller of the treasury to state the accounts of certain officers, and certify the same to the agent of the treasury, (not to the solicitor,) who, thereupon, is required to issue a warrant of distress against the delinquent, and his sureties. The statement of an account, and the issuing of process, it may be contended, requires no exercise of judicial power, but are the appropriate duties of ministerial officers, of commissioners, and of clerks. But commissioners and clerks are the ministerial officers of courts of justice. Their acts may be set aside; or, if approved, become essentially the acts of the courts which sanction them. To state the accounts, and issue the process authorized by the law in question,

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necessarily implies the exercise of judicial functions. It involves the power to receive or reject evidence; to determine its credibility and competency; to decide all questions of law and fact that may arise; to give a certificate of the sum due, equivalent in its effect to a judgment; and to award final process in the nature of an execution. It cannot be denied, that controverted questions of law and fact may often arise in the settlement of these accounts. If, to settle such accounts and issue such process be not the proper function of the judiciary, it would be difficult to conceive any controversy whatever, of a civil nature, not between the United States and its officers merely, but between man and man, arising under the constitution and laws of the United States, the cognizance of which might not be wrested from that department, and in the place of judges, versed in the laws, and responsible for the due exercise of their duties, transferred to executive agents holding their offices at the will of one man.

The act of Congress, Mr. Robertson contended, was in conflict with that part of the eighth article of amendments to the Constitution, which declared, that cruel and unusual punishments should not be inflicted. The fact would scarcely be credited by those who had not examined the subject, that under the warrant it authorized, a public debtor might be consigned to interminable imprisonment. There is no provision for his discharge. The insolvent laws, which give to the secretary of the treasury and to the president, authority in certain cases to liberate public debtors, do not extend to the case of one imprisoned under this treasury warrant. He is placed beyond the reach even of executive mercy, if, indeed, mercy might be expected from those who should pursue him with the rigors of such a statute. There are no means of relief, unless afforded by *habeas corpus*, or by a special act of Congress.

The severity of the law will not be defended, on the ground, that it meant to provide a punishment for a criminal default: for in no criminal prosecution can a citizen be deprived of the trial by jury. It will be said, it was intended to afford a civil



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remedy merely. Still, whatever it may be termed, perpetual imprisonment must be regarded as a punishment—not the less a punishment when inflicted for debt, than when inflicted for crime. It would be regarded as a cruel and unusual punishment for a criminal offence of minor grade: how much more cruel and unusual, when inflicted for that which is not a crime. Or, will it be maintained, that every excess of severity may be constitutionally practised, under the name of civil remedies for civil injuries; and that the payment of debts may be enforced by the *peine forte et dure*, or other torture, which the Constitution does not tolerate as a punishment for the most atrocious offence.

Mr. Robertson said, that the act of Congress was also in violation of the fourth article of amendments to the Constitution, which emphatically declare the right of the people to be free in their houses, persons, and goods, from unreasonable searches and seizures; and prohibits all warrants, unless upon probable cause, supported by oath or affirmation. If any seizure can be regarded as unreasonable, surely that must be so considered which is made by authority of a subordinate executive officer, consigning an individual to endless imprisonment, without even the forms of a judicial inquiry. The process is, in the law itself, termed a warrant. It is not required to be issued on probable cause, supported by oath or affirmation. The assertion of a treasury officer is taken for full proof to justify the seizure of body, land, and goods. It may be said that this clause, as well as the one before commented on, applies to criminal cases only. But, what reason is there for so narrow an interpretation of constitutional regulations in favour of liberty? Why shall a warrant in a civil case, not merely to commit, but to incarcerate for life, be founded on slighter evidence than one in a criminal case, issued solely with a view of bringing the party to trial?

The warrant of distress, it may be thought, resembles a *capias* requiring bail. But they are widely different. The requisition of bail is made, subject to the control of a court of justice, which will guard against abuse. The warrant is wholly under the direction of an executive officer. Bail is preliminary to a

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full and fair investigation. The warrant is final: it supposes the party already tried and condemned, or, rather, condemned without a trial. It is true, he may apply for an injunction—provided he can give security in such sum as the court may require. But security will never be received in a sum less than the amount claimed at the treasury. This, the prisoner may be unable to give, and in proportion as the demand is unfounded and extravagant, will it be difficult for the victim of injustice to obtain a hearing of his complaint.

Mr. Robertson said, there was another provision of the Constitution, on which he should rely with still greater confidence. It was the seventh article of the amendments, by which it was declared, that in suits at common law, where the value in controversy should exceed twenty dollars, the trial by jury should be preserved. The framers of the Constitution were well aware that this mode of trial did not belong to the courts of equity and of admiralty. But they meant to secure it in all cases of any importance, within the ordinary cognizance of the courts of common law. To say that the case under consideration is not a case of common law, because it is a summary proceeding by executive officers, would be to elude the provision referred to, and to render it a dead letter. Every case at common law, under such an interpretation, may be converted into a summary executive proceeding; and the amendments introduced with the deliberate purpose of securing that mode of trial, in a large and important class of cases, will have left it in the power of Congress to abolish it in all cases whatsoever.

Mr. Robertson said, it was impossible the law could be reconciled with the provisions of the Constitution to which he had referred. It had violated them by vesting judicial powers in the executive; by transferring to that department the cognizance of controversies at common law—of controversies to which the United States were a party; and by authorizing its subaltern agents to issue warrants, unsupported by oath or affirmation, whereby the person of an American citizen might be seized, and doomed to perpetual imprisonment.

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But if the Court should regard the act of Congress, as warranted by the Constitution, he should contend that it did not apply to the case, and that the proceedings under it had been altogether irregular.

The act applies only to officers who shall have *refused to settle and pay*. But Lieutenant Randolph settled his account in 1828, and now held the certificate of the proper officer that it was then *closed*. Admitting, for the sake of argument, there was error in the settlement; the accounting officers had no right, in the mode they had adopted, to open the account anew. If they had, there was no limitation to restrain them from so doing as often as they pleased, and at any distance of time. Such a proceeding might lead to gross injustice and abuse.

But had the account in this case been an original account, it was not such as justified the solicitor in issuing a warrant. It should have been one, in the words of the statute, "*exhibiting the amount truly due*." He referred to other clauses, showing plainly the intent of the law, that this summary proceeding should not be adopted, except where the true balance was precisely ascertained; and the case itself was a striking illustration of the propriety of the restriction. Here was an account comprising large sums heretofore allowed as credits. The two credits in the old account constitute the debits of the new. Two items amounting to upwards of \$12,000, were, as the fourth auditor avers, paid in part out of the money and stores of Purser Timberlake, and out of the ship's stores, and are re-charged; that Lieutenant Randolph may show, what part was paid out of his money and stores, and what out of the money and stores of Purser Timberlake. These items are not mentioned to show the obvious impropriety of the treasury officers using this law, as an instrument to adjust the accounts of third persons. They are referred to as an admission, that Lieutenant Randolph was entitled to a part, at least, of the sum charged, and, consequently, that the balance exhibited by the accounting officers, and for the recovery of which the warrant of distress had been issued, was not *truly due*.

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Mr. Robertson said, it must be admitted, that the act was one of extreme severity. It was incumbent, therefore, on those who should attempt to enforce it, to bring themselves, in every particular, plainly within its letter. He now proceeded to point out other irregularities.

The warrant stated, that Lieutenant Randolph was *indebted* to the United States, in the sum of \$25,097 83. This statement, as he had already remarked, was falsified by the admission in the account. But the objection he meant now to urge, was, that it had not been stated nor shown, *on what account* the alleged debt was incurred. It was not every debt, for the recovery of which this summary proceeding was authorized, but such only as should be incurred by officers employed to disburse money appropriated for the service of the civil, military, or naval, departments. The account consisted of sums once credited, and now debited; but these credits, whatever conjectures they might justify, did not disclose the nature of the original debt, against which they had been received as credits, nor was it shown, that that debt was incurred in the disbursement of money appropriated by Congress, for any of the departments.

Again;—the first item of the account, charges Lieutenant Randolph with upwards of \$11,000, *for cash received about the 3d of April, 1828, being the amount left by Purser John B. Timberlake.*

If, in truth, this cash, as stated, was left by Timberlake, how happens it, that it is claimed by the government of the United States? It may be true, that it was actually the very money furnished by the government to the late purser; but that fact does not legally appear, nor is it easy to perceive how such a claim could be maintained. There was no ear mark, he presumed, by which the funds could have been identified, and if not, they passed upon the death of Timberlake, with all other funds from whatever quarter received, to his personal representatives.

There was but one other objection which he should urge against

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the legality of the proceedings, and it was one which he regarded, of itself, as absolutely fatal. It was, that Lieutenant Randolph was not *an officer* within the contemplation of the act. He was described in the proceedings as "acting purser." No such officer was known to the law. It would not be pretended, that he had ever been appointed purser. He is charged with having assumed the pursership upon the decease of purser Timberlake, on a distant station. It was not meant to be denied, that the acting purser was liable to account to the government, or to the representatives of the deceased purser, for the funds he had received. But he relied with full confidence, that a statute, authorizing summary proceedings against a specified class of public officers, could not be extended, by construction, to persons not fairly within its terms.

In every point of view, he submitted that Lieutenant Randolph was entitled to his discharge.

Mr. *Nicholas*, as *amicus curiæ*, before making any remarks in reply to Mr. Robertson, offered in evidence a letter from the fourth auditor, to Mr. Randolph, dated, March 8th, 1833, and one from Mr. Randolph in reply thereto, dated on the twelfth of the same month, containing admissions by Mr. Randolph of certain items charged against him in account, but subject, as he insisted in his letter, to off-sets relied on by him.

The competency of this evidence was denied, by the counsel for Mr. Randolph, upon the ground, that all evidence adduced by the United States should be confined to the warrant, and to the return upon the face of it; and also, upon a distinction which, it was urged, existed between stating an account at the treasury department, and the re-opening of an account by the auditor, which had once been stated there. In the latter case, it was contended, that no admissions, by a party, should be allowed to prejudice him, any more than negotiations between individuals are permitted to do so, which have for their object the adjustment of a controversy, or the effecting of a compromise. This objection was reserved by the counsel for Mr. Randolph, subject to the future opinion of the Court.

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Mr. Nicholas, in reply to the objections urged by Mr. Randolph's counsel to the admissibility of the evidence, observed, that he was of opinion, that the Court had no legal right to examine into the details of the account upon which the warrant was founded, in this incidental manner; but in the event that the Court should be of a different opinion, and in order to meet every contingency, he had determined to introduce the evidence to sustain that account.

Mr. Nicholas then proceeded to reply to the argument of Mr. Robertson, and said, that in compliance with a wish expressed by the Court, he had assumed the responsibility (and a serious and imposing one he felt it to be) of replying to the able and eloquent counsel who had appeared in support of the present application of Robert B. Randolph, to be discharged from the custody of the marshal. That the little time that had been afforded him for the investigation of the subject, requiring as it did, an examination of numerous acts of Congress hitherto new to him, and involving the discussion of many important and interesting questions of constitutional law, was calculated to augment the embarrassment with which he proceeded to discharge the duty that had devolved upon him. But that he derived no inconsiderable degree of encouragement from the reflection, that whatever omissions he might make in the argument, would be amply supplied by the intelligence of the Court. He understood the question then submitted for the decision of the Court, to be this:—Did the return which had been made by the marshal upon the writ of *habeas corpus*, by virtue of which, Robert B. Randolph had been brought before the Court, set forth a lawful and sufficient cause for his detention in custody? That it had been contended by the counsel who opened the discussion, that the return of the marshal did not exhibit any sufficient reason for such detention, but that, on the contrary he was held in confinement unjustly, and without any lawful authority. He should endeavour to establish the converse of the proposition, and to show that the confinement complained of, and from which a discharge was now sought, however harsh, unjust, and

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oppressive it might seem to the imaginations of gentlemen, was, nevertheless, sanctioned and justified by the laws of the United States, and not in conflict with any principle of the Constitution, and not more harsh than other proceedings known to the law. That Mr. Robertson had commenced his argument by general and sweeping denunciations of the law, under which this warrant had issued, had represented it as subversive of many of the most valuable provisions of the Constitution, destructive of liberty, tending to despotism, annihilating the trial by jury, and utterly at war with the whole spirit of our institutions. That he had then descended to a specification of the various parts of the Constitution, with which he supposed it to be in conflict.

Mr. Nicholas said, he would endeavour to vindicate the law from the attacks of Mr. Robertson, by a refutation, in detail, of the various constitutional objections that had been urged. The first objection was founded upon the first and second sections of the third article of the Constitution, which declare, that the judicial power of the United States shall be vested in the supreme court, and such other inferior courts as Congress may, from time to time, ordain and establish; and shall extend to all cases in law and equity, arising under the laws of the United States, and to all controversies to which the United States are parties. It had been contended that the act of Congress under which this warrant issued, was unconstitutional and void, because it conferred a portion of the judicial power upon a subordinate executive officer, whilst the Constitution had vested the whole judicial power in the courts of the United States. Mr. Nicholas said, that in deciding whether the power given by the act of Congress of May, 1820, to the solicitor of the treasury, to issue warrants like the present, was a constitutional power, it was important, in the first instance, to determine, clearly and distinctly, what was meant by judicial power. The judicial power he conceived to be synonymous with the power of a court of justice: For Blackstone, Vol. III., p. 23, defines, (a definition taken from Coke Littleton,) a court to be a place wherein justice is judicially administered. What, then, were the powers

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of courts of justice? They must be co-extensive with, and limited by the objects for which all courts are instituted and established. That object, as he understood it, in its most enlarged and general sense, was the decision of legal controversies or suits, (either of a civil or criminal nature,) between contending parties. Hence, he said, it followed, as a necessary consequence, that if there be no suit depending for the redress of a civil injury, or prosecution for a public wrong, there can be no exercise of a judicial power; and that, therefore, no act done by a private individual, or by a public officer, unconnected with any civil suit or criminal prosecution, can be properly or legally regarded as a judicial act. To sustain this position of law, that to call forth the exercise of judicial power, it was essential that there should be a *lis pendens*, he referred to the distinction taken in 3 Black. Com. p. 3, between the redress of injuries which may be obtained by the act of the party, and that to be afforded by the intervention of a court; and contended, that the remedy given to the United States, in the case of a delinquent officer, by the act of 1820, came within the former class. He said, moreover, that it was a remedy founded in reason, and the necessity of the case. He remarked, that there were many analogous cases known to the law; but relied more particularly upon the power of distress for rent, which, he said, bore a strong affinity to that given by the statute; and urged, that rent could not, with justice or propriety, be placed on higher ground, than debts due from a public officer to the government. Nobody ever supposed that a landlord who distrained for rent was performing a judicial act. The law, too, gave him redress by action of debt. He further referred to provisions in the collection laws of the United States, 1 Story, 632, secs. 68, 69, as giving an analogous power to certain officers of the customs, even upon bare suspicion, to seize goods.

Mr. Nicholas adverted to the second article of the new Constitution of Virginia, as containing a provision analogous to that, which Mr. Robertson had contended, was violated by this law, and which article of the state constitution expressly inhibits an



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officer of one department of the government from exercising any of the powers belonging to the other departments. But, said he, there are many powers given by our laws to private individuals, and to different executive and mere ministerial officers of the government, more nearly resembling judicial powers, than that given by this act of Congress, which have never been regarded as violating the Constitution. If bail be not given, when demandable by law, the debtor may be imprisoned at the instance of the creditor. 1 Rev. Code, 499, sec. 43. If a writ be returned *non est inventus*, the plaintiff may either take out a *pluries* writ, or issue an attachment, to force an appearance, at his election. 1 Rev. Code, 504, sec. 61. Clerks of courts, surveyors, and commissioners in chancery, make out their own fee bills, which have the force of executions, and if not paid when demanded, may be levied upon the goods and chattels of the debtor. The auditor is authorized by law, to settle claims against the state, and appeal is allowed from his decision to the courts: and yet, said Mr. Nicholas, none of the foregoing have ever been regarded as judicial powers. Mr. Nicholas farther contended, that there was a wide distinction between the mere process and the judgment of the court; that the former was a ministerial, the latter a judicial act; the former the means employed, the latter the end to be attained. That the warrant authorized by the act of Congress, is denominated a "*summary process*" in the act itself. Mr. Nicholas contended, that the second section of the third article of the Constitution of the United States, is strictly applicable to suits actually depending, and that as no such suit here existed, the warrant in this case does not contravene that section.

The eighth article to the amendments of the Constitution, Mr. Nicholas said, had no application to the case. This is no case of bail, no fine imposed, no excessive punishment inflicted; and Mr. Robertson's fertile imagination could alone have enabled him to discover the connexion. He had said, that although the law did not sanction unusual punishment in terms, yet it had the same effect, by dooming a man to perpetual imprisonment,

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and *peine forte et dure*, unless he paid a debt, or gave security. The great oppression of the law and the great hardship of the case, which Mr. Robertson had so earnestly insisted upon, Mr. Nicholas alleged, consisted in the mere fact of requiring security for the payment of a debt, and the amount of that security to be fixed by the court, according to the circumstances of the case. No great hardship, Mr. Nicholas contended, upon one who had received and misapplied the public money, and who knew, or ought to have known, the conditions upon which he accepted the office of purser. He cited instances of equal rigor, which were familiar, and which were yet never regarded as infringements of the Constitution.

A judgment by surprise, might be unjustly obtained against an individual who could obtain no redress, either by injunction or appeal, without giving bond and security; and a man could not receive a legacy without doing the same. Mr. Nicholas contended, that the fourth article of the amendment to the Constitution was not violated by the law, under which this warrant was issued. That article, he insisted, applies only to criminal cases, and not to proceedings for the recovery of debts; and, in illustration of this position, he referred to the tenth article of Bill of Rights of Virginia, containing an analogous provision, and clearly confined to criminal cases. The case, *ex parte* Burford, 3 Cranch, 448, to which Mr. Robertson had referred in support of this objection, was a criminal case. In reply to the objection founded upon the provisions of the seventh article of the amendments to the Constitution, declaring that in all suits at common law, the right of trial by jury shall be preserved, Mr. Nicholas insisted, that the act of Congress did not, in the slightest degree, encroach upon that right;—that he felt as sincere a veneration as the opposing counsel could do, for that invaluable mode of trial, which he certainly regarded as the safest mode of investigating truth, ever devised by the wit of man; and as the chief bulwark of liberty in every country where it had been adopted. He said, that the article referred to, applied only to suits actually depending at *common law*, as

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contradistinguished from *admiralty* causes, and suits in *equity*. Because the right of trial by jury, is guarantied by the Constitution, it by no means followed, he urged, that there was no other legitimate mode of deciding controversies, and ascertaining the respective rights of contending parties. On the contrary, every lawyer, and every man of ordinary intelligence in the community knew, that the most important questions of property, involving thousands of dollars, were every day decided, without the intervention of juries. In the courts of admiralty, and in the chancery courts, in a great variety of motions allowed by law, and upon arbitration, this is known to be the case. But, said Mr. Nicholas, there is another conclusive answer to this objection, and that is, that in this very case the party may have the benefit of a jury trial; for the act provides, that if any person shall think himself aggrieved by any warrant under this law, he may obtain an injunction to the warrant, which shall be conducted according to the principles of a court of equity, which courts, we all know, have the power, when they may deem it necessary, to establish any controverted fact, to invoke the aid of a jury.

Mr. Nicholas continued, that he had now, he believed, answered all the objections urged by Mr. Robertson, growing out of a supposed conflict between the acts of Congress, and the Constitution of the United States, and it only remained for him to examine some objections founded upon what Mr. Robertson regarded as irregularity in the proceedings. That gentleman, he said, had contended, that as this was an extremely harsh and rigorous law, the Court was bound to give to it the strictest possible construction, and to see that it was literally pursued. He then objected, that the warrant, did not aver a failure to settle his account in the manner required by law; but, said Mr. Nicholas, the act authorizes the warrant not only upon failure to settle his account, but also on failure to pay over the money, which last is expressly averred in the warrant. It had been objected by Mr. Robertson, that this was a settled account, and that the officers of the treasury, had no right to open settled ac-

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counts, as otherwise, there never would be an end of investigation; but it was urged by Mr. Nicholas, that although the account was settled upon the treasury books, the government was not concluded thereby. The *settled* account does not embrace debits included in *this* account; and although he may have fairly disbursed and accounted for, all the money with which he was charged on *that* account, it does not exonerate him from responsibility in regard to sums not included in the former account, but with which he is properly chargeable, and for which, he admits himself justly chargeable, in his letter of the 12th of March, 1833, which has been read to the court.

It had been further objected, that this was not such a stated account as warrants this process, because it should show what amount was really due to the United States, and not merely what was claimed; and that a part of the charge of \$ 10,000 was admitted, upon the face of the account, not to be due; but, said Mr. Nicholas, Randolph has admitted the correctness of the charge, and he is liable, moreover, upon the principle of the *confusio bonorum*, whereby, when one man wilfully mixes his goods with another's, in such a way as to prevent them from being distinguished, the individual, who produces this confusion, shall bear the whole loss. 2 Blacst. Com. 405. Mr. Robertson had contended, that this account was not stated by the proper officer; but, to disprove this proposition, Mr. Nicholas referred to Ingersoll's Digest, pp. 7 and 8, "Accounts," sections 4 and 9. In reply to an objection, that the warrant did not aver a failure to pay over the money within the time required by law, it was insisted, that the warrant referred expressly to the law, and was sufficiently certain. And, in regard to the allegation that the warrant did not specify upon what account, or for what particular department of the government the appropriation was made, Mr. Nicholas contended that it clearly appeared from the face of the warrant, and also from Randolph's own admissions, that it was on account of the navy department.

Mr. Nicholas contended, moreover, that the court upon the return of a *habeas corpus*, will not look into the regularity of

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the proceedings upon which a judgment is founded, in pursuance of which, a party is taken into custody; but that they will only inquire, whether a sufficient probable cause existed, to warrant the commitment, and that in a case of this sort, they have not the powers of a court of error; in support of which positions, he referred to *Rex v. Suddis*, 1 East, 306, and to *United States v. Johns*, 4 Dallas, 412. Mr. Robertson had contended that the warrant contained no such description, and that there was no proof that Randolph was such an officer as was contemplated by the act; that he was described as "acting purser;" that he could not have been a regular purser, because he assumed the duties immediately upon the death of Timberlake in the Mediterranean, and could not, therefore, have been regularly appointed. In answer to which suggestion of Mr. Robertson, Mr. Nicholas laid down this principle of law; that whenever it is manifest that a party has acted in discharge of the duties of an office, and is an officer *de facto*, although there may be no proof of any regular appointment, he is, nevertheless, as responsible for his acts, as if he had been appointed in the most formal manner. In support of which position, he referred the Court to the following cases: *Berryman v. Wise*, 4 T. R. 366, *Potter v. Luther*, 3 Johns. Rep. 431, and *People v. Collins*, 7 *Ib.* 549. He also referred to 5 Bac. Abr., for this position, that every man is a public officer, who hath any duty concerning the public. Mr. Nicholas adverted, in illustration of the principle contended for, to the case of an executor *de son tort*, who derives no authority from the testator, but who assumes the office by his own intrusion and interference; and yet is held responsible in law for all his acts connected with the estate, equally with an executor who had been regularly appointed and qualified.

But, said Mr. Nicholas, Mr. Robertson has admitted Randolph's liability to a certain extent, but contends that he is not amenable to this process; but if he is liable at all, he must be subject to all the obligations annexed to the office; which he held *de facto*, if not *de jure*. The case of *The Auditor v. Dry-*

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den, (p. 703,) referred to by Mr. Robertson, in 3 Leigh, has no application to the case. The warrant was directed to the marshal of the Eastern District of Virginia, and it was necessary to aver in the warrant, that Randolph resided in the district. Writs of *capias ad respondendum* never describe defendants as residents of any particular county, though the law requires them to issue, in the first instance, to the county where the defendants reside. Mr. Nicholas referred to 3 Story, 1622, to show that the laws of the United States intended to provide for the cases of pursers on distant service, who might act without giving bond and security; and he contended, that the necessity of the case required, that naval commanders should have the power of appointing temporary pursers, in case of the death of a regular purser.

Mr. Nicholas concluded by remarking, that the act of Congress, under which this proceeding was instituted, had been in force for thirteen years, and that it had been acted upon in this state, on at least two former occasions, viz: in the case of Taylor, and the case of Robertson, the collector at Petersburg: and he thought it more than probable, that it had been enforced in other states, but that this was the first time it had ever been resisted as unconstitutional; it seemed, however, to be the fashion of the times, to raise constitutional questions, and to nullify acts of Congress.

Mr. Leigh concluded the argument on behalf of the petitioner.

The judges delivered their opinions, as follows:

BARBOUR, J.—This is a *habeas corpus*, issued by this Court, upon the application of Robert B. Randolph, alleging that he was imprisoned by the marshal of the Eastern District of Virginia, without lawful authority.

The marshal returns as the cause of the detainer of the party, a warrant of distress, issued by the solicitor of the treasury of the United States, against Randolph, for a sum of money, stated

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in the warrant to be due from him to the United States, and which he has failed to pay in the manner, and at the time required by law; which warrant was issued under the third section of the act of the 15th of May, 1820, concerning the treasury department. From the warrant, and the account annexed to it, and referred to, as part of it, it appears that the sum claimed from the party, is claimed as being due from him, a lieutenant in the navy, *as acting purser*, on board the frigate Constitution, for his transactions in that character in the year 1828. It appears, from another document produced by the party, duly authenticated by the fourth auditor, and sanctioned by the comptroller, that Randolph had, in October, 1828, settled his account as acting purser on board the Constitution; but, notwithstanding this previous settlement, the account on which the warrant of distress was issued, under which the party is imprisoned, is one stated at the treasury of the United States, in February, 1833, against him as late acting purser of the frigate Constitution, for the same period embraced in the account above mentioned to have been settled in October, 1828; the present fourth auditor of the treasury, having opened the former account, and re-stated it, so as to produce the result stated in the account of February, 1833, beforementioned, upon the ground, as appears from the face of this last account, of the subsequent discovery of errors and omissions, since the settlement of that of 1828.

Upon this state of facts, the party's counsel have argued, that he is entitled to be discharged; and in the course of the argument, have brought into discussion, many and various points, the first of which is of the gravest import: it calls in question, directly, the constitutionality of the act of Congress, under which this proceeding is had. The decision of a question of this sort, is certainly the highest, and most solemn function, which the judiciary could be called upon to perform; for, as was said with sententious brevity by the Court, in one of the earliest cases on this subject, it involves the inquiry, whether the will of the representatives, as expressed in the law, is, or is not, in

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conflict with the will of the people, as expressed in the Constitution. Great, however, as is the responsibility involved in this exercise of judicial power, I should meet it without difficulty, if it were necessary to the decision of this cause. But I fully concur in the sentiment of counsel, that whilst, on a proper occasion, it ought to be met with firmness, on the other hand, it is the part of wisdom, to decline the decision of such a question when not necessary.

From the view which I have taken of this case, I do not consider it necessary, and shall therefore pass it without further remark. It is wholly irrelative to the merits of this case, to inquire, whether there may not have been error committed by the auditor, in the stating of the account, on which this proceeding is founded; because, we are not sitting here, to reverse this case, as an appellate court, on a writ of error, nor, is it before us, as the proceedings of special jurisdictions in England are before the king's bench, by *certiorari*. In either of those aspects, the decision which we should be called upon to make, would depend upon the result of the inquiry, whether there was, or was not, error in the proceedings; but, sitting as we are, upon a *habeas corpus*, the question is not, whether there is error in the proceedings, but, whether there was jurisdiction of the case, in the auditor of the treasury. It was settled as early as the great Marshalsea case, in 10 Coke, 76, and the principle has never been departed from, that where a court has jurisdiction, and proceeds in *verso ordine*, or erroneously, there the proceeding is only *voidable*; but where the court has not jurisdiction of the case, there the whole proceeding is *coram non judice*, and *void*: the books, both English and American, abound in cases exemplifying this principle.

But a *habeas corpus* will not lie, where the imprisonment is under voidable process, but only where it is merely void; for void process is the same thing as if there were none at all; and then the party is in effect imprisoned, without any authority whatever. Hence, the question would seem naturally to arise, whether the auditor had jurisdiction in the case—in other words,



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whether the person and the subject matter are such as to bring the case within the provisions of the act of Congress—for these are the criteria of jurisdiction. This question was elaborately argued at the bar, and I have considered it with great care. I forbear, however, to enter into the discussion of it here; because, although it should be clearly made out, that the auditor had once had jurisdiction, yet upon the facts in this case, another question arises, which, in my opinion, is decisive of the case; and that is, after the auditor shall once have settled an account of a public officer, and closed it, as in this case, is it competent for him at an after time, upon an allegation of error, or omission, or for other cause, to open it, re-state it, and upon the account thus re-stated, to institute proceedings by a warrant of distress against the debtor? I think it is not. Let us try the question by reference to some analogous cases. I take it to be a sound principle, that when a special tribunal is created, with limited power, and a particular jurisdiction, that whenever the power given is once executed, the jurisdiction is exhausted and at an end—that the person thus invested with power is, in the language of the law, *functus officio*. This proposition is, I think, sustained by the case in 6 Bingham, 85, where it is said by the court, that when a magistrate, who has power to convict, has once convicted, his jurisdiction is at an end—he is *functus officio*.(2) Could he, at any after time, upon some supposed error, quash, or in any way impair, the efficiency of his own conviction? Suppose a controversy to have been submitted to arbitrators, and that they had made a final award, and delivered it, could they afterwards, on their own mere motion, change, or set aside their own award? Lest, however, it might be supposed that there might be any thing peculiar in this case, by reason of their being judges of the parties' own choosing, let us suppose some cases of special jurisdiction, or powers given by law. Under the acts imposing direct taxes, assessors were appointed

(2) *Creppe v. Durden*, Cowper, 640, cited and approved by the court, in *Mills v. Collett*, 6 Bingham, 85; 19 Eng. Com. Law Rep. 11-14.—[Editor.]

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to value the lands and slaves of the country, with a view to a just apportionment. After they had made and completed their assessment, so that it was once communicated, agreeably to the requirements of the law, could they afterwards, in any manner, have altered it, so as to change the valuation? Suppose that commissioners of bankruptcy had once decided in a given case—that the party was a trader, that he had committed an act of bankruptcy—and had, in all respects, completely executed the power conferred upon them, could they afterwards, by their own authority, have vacated, or set aside their act? Finally, suppose that the commissioners appointed (under any one of the treaties, under which we procured an indemnity from Spain, France, or Naples,) to adjudge the claims of our citizens, had fully executed that trust—had made and announced an entire distribution of the fund; could they, at an after time, have varied their own adjudication? In all the cases which I have put, I inquire into the power of the special jurisdiction, of its own mere authority to alter or impair, what they had done. Examples might be indefinitely multiplied; these are sufficient to illustrate my idea, viz., that whenever a special jurisdiction has once executed the power with which it was invested, their power is at an end, as to the subject in relation to which it has been executed. Let us trace the injurious consequences of a contrary doctrine. Until the power of the auditor is once executed, the officer knows that it is his duty to account, and having accounted, to pay. But if, after the account had once been stated and closed, he could open it again, how often, and within what period of time, shall he do it? There is obviously no limitation, either as to length of time, or to frequency. Suppose, after once stating it, and then opening it, and re-stating it upon alleged error, he should think he had discovered error, he must open and re-state it again. It will be observed, too, that though the auditor in this case did give the party notice, the law does not require it; unless, therefore, he shall be restrained to one settlement, it would be competent to him, years after the death of the original party, without notice, in the absence of his representatives, who might be dispersed through the United States,

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and in the absence of all proof on their part, to resettle the account in a manner which would produce great injustice. But, again: If it be competent to him to open the account in favour of the United States, the converse of the proposition must be equally true, upon the principles of justice; it must be competent to him also, after the lapse of years, to open it against the United States, and in favour of the party. Might not this course most injuriously affect the public interest? It seems to me, that a doctrine, which leads to such consequences, cannot be sound; and that the government is not without ample remedy, though this power shall be denied to the auditor. I suppose there can be no doubt, that a bill in equity would lie, to surcharge and falsify, as in case of a settled account between individuals; and moreover, according to the doctrine of the Supreme Court, 11 Wheat. 237, (*Perkins v. Hart*,) *even at law*, although a settled account would be *prima facie* evidence, yet it could recover, upon proving mistakes or omissions, any sum, of which it had been thus unjustly deprived. Nobody doubts the power of the auditor to settle the accounts of the public officers from time to time, as they shall fail to account, or pay, any sums accruing after previous settlements; the objection is, to resettling an account once settled, and which must have imported to have been a full and final settlement, at the time when made; for the law requires that to be done.

I have felt some difficulty upon the question, whether a *habeas corpus* could be sustained in favour of a party imprisoned under civil process, as in this case. The difficulty arose from the doubt expressed by two high authorities, although decided by neither. In *Ex parte Wilson*, 6 Cranch, 52, the party was arrested by a *capias ad satisfaciendum*, and was in prison bounds. An application was made for a *habeas corpus*, on the ground, that the creditor had refused to pay his daily allowance. The court said it was not satisfied that a *habeas corpus* was the proper remedy, in a case of arrest, under civil process. In 15 Johns. 152, (*Cable v. Cooper*,) the Supreme Court of New York, except one of the judges, express the same doubt, and refer to the case in Cranch. The judge, in delivering the opinion of the

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court, says, if it were necessary to decide the point, he should say, it would not lie in such a case.

I suppose that, probably, the doubt originated from this fact. The celebrated *Habeas Corpus* Act of 31 Charles II. which, as Judge Kent, in his Commentaries, says, is the basis of almost all the American statutes on the subject, and which, in practice, by reason of its valuable provisions for insuring speedy action, has almost superseded the common law, has been held in England to be confined to *criminal cases*. All the judges of England in answer to a question propounded to them by the house of lords, answered: That it did not extend to any case of imprisonment, detainer, or restraint whatsoever; except cases of commitment for criminal, or supposed criminal matters, 3 Bac. 438, *note*. At the same time this question, in substance, was put to them: whether if a person imprisoned apply for a *habeas corpus ad subjiciendum*, at common law, and make affidavit that he does not believe that his imprisonment is by virtue of a commitment, for any criminal, or supposed criminal matter, would such affidavit, as the law then stood, be probable cause for awarding the writ? The question being objected to, was not put. This would seem to leave the point in an unsettled state. Yet there are two books of authority, which, I think, sustain the doctrine, that the writ is not confined to criminal cases. Blackstone, in Vol. III. p. 132, says, that the great and efficacious writ *in all manner of illegal confinement* is the *habeas corpus ad subjiciendum*. Bacon, Vol. III. 421, says: whenever a person is restrained of his liberty, by being confined in a common jail, or by a private person, whether it be for a criminal or *civil cause*, he may regularly, by *habeas corpus*, have his body, and cause, removed to some superior jurisdiction, &c.

Now, the act of Congress, authorizes us to issue the writ, "for the purpose of inquiring into the cause of commitment." Upon this, the Supreme Court, in 3 Peters, 201, *Ex parte Watkins*, remarks, "that no law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it. The term is used in the Constitution, as one which is well understood. This gene-

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ral reference to a power which we are required to exercise, without any precise definition of that power, imposes on us the necessity of making some inquiry into its use, according to that law, which is, in a considerable degree, incorporated in our own."

If, in making this inquiry, we were to consult the British statute alone, we should find it, as already stated, confined, in its construction, to criminal cases.

But, if we look to the common law authorities which I have mentioned, it seems to me, that we are justified in applying it to a case of civil process.

Indeed, we know it to have been repeatedly applied in England to the domestic relations of life, such as the liberation of a wife from the unjust restraint of a husband, and a child from that of a parent.

And certainly, we are well warranted in making this reference to the common law; because, although it is admitted by all, that it is not a source of jurisdiction, yet it is habitually, rightfully, nay, necessarily referred to for the definition and application of terms; indeed, there are many terms in the Constitution, which could not otherwise be understood.

Nor do even the doubts expressed in the cases from Cranch and Johnson, apply to this; for both of those were on process of civil execution, issuing from a court of record and general jurisdiction; whereas, this is a case of process, issuing from a special jurisdiction, which can neither be supervised by *certiorari*, nor re-examined by writ of error. In this case, then, if a *habeas corpus* would not lie, there would be no relief from imprisonment without lawful authority. In cases of execution from courts of record, the courts themselves can quash it, if it do not conform to the judgment; if it do, and that judgment be erroneous, it can be corrected in a court of appellate jurisdiction. Upon the whole view of the subject, I am of opinion that the party should be discharged.

MARSHALL, C. J.—Robert B. Randolph, late acting purser of the frigate Constitution, was brought into court, on a writ of

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*habeas corpus*, and a motion is now made for his discharge from imprisonment.

The writ was directed to the marshal of this district, in whose custody he is. The return of the officer, shows the cause of caption and detention, to be a warrant issued by the accounting officers of the treasury, under authority of the act passed the 15th day of May, 1820; which, after reciting that Robert B. Randolph, late acting purser of the United States frigate Constitution, stands indebted to the United States in the sum of \$25,097 83, agreeably to the settlement of his account, made by the proper accounting officers of the treasury, and has failed to pay it over according to the "act for the better organization of the treasury department," commands the said marshal to make the said sum of \$25,097 83 out of the goods and chattels of the said Randolph; and in default thereof, to commit his body to prison, there to remain until discharged by due course of law. If these proceedings fail to produce the said sum of money, the warrant is to be satisfied out of his lands and tenements.

The return shows that the body of the said Robert B. Randolph was committed to prison, and is detained by virtue of this process.

Several objections have been taken to the legality of the warrant; the first and most important of which is, that the act of Congress, under the authority of which it issued, is repugnant to the Constitution of the United States. If this objection be sustained, the warrant can certainly convey no authority to the officer who has executed it, and the imprisonment of Mr. Randolph is unlawful.

The counsel of the prisoner rely on several parts of the Constitution, which they suppose to have been violated by the act in question. The first section of the third article, which establishes the judicial department, and the seventh amendment, which secures the trial by jury in suits at common law, are particularly selected as having been most obviously violated.

No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality

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of a legislative act. If they become indispensably necessary to the case, the Court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed.

The act of Congress, under the authority of which the process by which Mr. Randolph is imprisoned was issued, makes it the duty of certain officers of the treasury to settle, and cause to be stated, the account of any collector of the revenue, &c., who shall fail to render his account, or pay over the same in the manner, or in the time required by law, exhibiting truly the amount due to the United States, and certifying the same to the agent of the treasury, who is authorized, and required to issue a warrant of distress against such delinquent officer and his sureties, directed to the marshal of the district in which such delinquent officer and his surety, or sureties shall reside; which officer is commanded to make good the money appearing to be due to the United States, by seizing, and selling the goods and chattels of such delinquent officer and his sureties, and by committing the body of such delinquent officer to prison, there to remain until discharged by due course of law.

If this ascertainment of the sum due to the government, and this issuing of process to levy the sum so ascertained to be due, be the exercise of any part of the judicial power of the United States, the law which directs it, is plainly a violation of the first section of the third article of the Constitution, which declares, that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress shall from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour." The judicial power extends to "controversies to which the United States shall be a party."

The persons who are directed by the act of Congress to ascertain the debt due from a delinquent receiver of public money, and to issue process to compel the payment of that debt, do not compose a court ordained and established by Congress, nor do they hold offices during good behaviour. Their offices are held

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at the pleasure of the President of the United States. They are, consequently, incapable of exercising any portion of the judicial power, and the act which attempts to confer it, is absolutely void. In considering the validity of this act, therefore, it is necessary to discard every idea of its conferring judicial power. We must not view the statement or certificate of the account as a judgment, or the warrant which coerces payment, as judicial process. They must be viewed as mere ministerial acts performed by mere ministerial agents. They cannot be otherwise sustained.

I will, for the present assume, that the power of collecting taxes, and of disbursing the money of the public, may authorize the legislature to enact laws by which the agents of the executive may be empowered to settle the accounts of all receiving and disbursing officers, and to issue process in the nature of an execution, to compel the payment of any sum alleged to be due. But these agents are purely ministerial, and their acts are, necessarily, to be treated only as ministerial acts. The inevitable consequence is, that their validity must be decided by those legal principles which govern all acts of this character. These require, that the authority, whether given by a legislative act, or otherwise, must be strictly pursued. Such agents cannot act on other persons, or on other subjects, than those marked out in the power, nor can they proceed in a manner different from that it prescribes.

This is a general rule, applicable to such cases generally; it applies with peculiar force to that now before the Court.

I will not attempt to detail the severities and the oppression which may follow in the train of this law, if executed in contested cases. They have been brought into full view by counsel, in their arguments, and I will not again present them. It may be said with confidence, that the legislature has not passed any act which ought, in its construction, to be more strictly confined to its letter. By this rule its words will be examined.

The first objection to this warrant is, that Mr. Randolph is not one of those persons on whom the law was designed to operate.



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The act does not declare that every debtor of the public shall be subject to this summary process. The particular persons against whom it may be used are enumerated. Those stated in the second section are, "any collector of the revenue, receiver of the public money, or any other officer who shall have received the public money, before it is paid into the treasury of the United States." The obvious construction of these words is, I think, that they describe persons who hold offices under government, to whose hands the public money comes before it reaches the treasury. A collector of the revenue is an officer of this description; so is a receiver of the public money; and the following words, "or other officer who shall have received the public money before it is paid into the treasury of the United States," demonstrated the kind of persons who were in the mind of the legislature. The subsequent words preserve the idea, that regularly appointed officers only were intended. The word officer, is retained, and is regularly used throughout the section, showing plainly, that no other debtor than one who was properly designated by the term officer, was contemplated by the act. Throughout the section, too, the sureties of such officer are regularly connected with him, and subjected to the same process, so far as respects their property. I do not mean to say, that the liability of the officer is made to depend on his having actually executed an official bond with sureties. I do not mean to say that an officer, regularly appointed, who should receive the money of the public before the execution of his bond, might not be liable to this treasury execution. But I mean to say, that this language proves incontestably that the legislature contemplated those officers only, who were required to give bond with surety, as the objects of the law. The sureties are spoken of throughout, as inseparable from the officer, as existing whenever the officer exists.

This section does not comprehend the case of a purser in the navy, but I have thought it necessary to enter into its exposition; because it has a material bearing on the third section, which does comprehend persons of that description.

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The third section enacts, "that if any officer employed, or who has been heretofore employed in the civil, military, or naval departments of the government, to disburse the public money appropriated to the service of these departments, shall fail to render his accounts, or to pay over in the manner, and in the time required by law, or the regulations of the department to which he is accountable, any sum of money remaining in the hands of such officer, it shall be the duty," &c.

To what persons does the word officer, as used in this section, apply? Is it to every commissioned officer in the army or navy of the United States, to whose hands any public money may be intrusted, or is it to those officers only, whose regular duty it is to receive and disburse the public money, and who are appointed for that purpose? The language of the sentence, I think, answers these questions to a reasonable certainty. It is "any officer employed to disburse the public money appropriated to the service of these departments respectively." A military or naval officer is employed for military or naval duties, not to disburse the public money appropriated to the service of his department. I cannot suppose, that a military or naval officer to whose hands, money belonging to the public may come, is, from the words of the act, more liable to this summary and severe proceeding, than any individual not bearing a commission, to whom the same money might be confided for similar purposes. The subsequent words of the sentence, "shall fail to render his accounts, or to pay over in the manner and in the time required by law, or the regulations of the department to which he is accountable," &c., also convey the idea that a regular disbursing officer, whose duty was prescribed by law, or by the regulations of the department, was contemplated. This idea is still more strongly supported by that part of the section which adopts all the provisions of the second section, and applies them to the sureties of the officer who is designated by the act, as well as to the officer himself. I think, then, the fair construction of the law is, that regularly appointed officers who are required to give official bonds, were alone contem-

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plated by the legislature. If we take into consideration the character and operation of the act, the extreme severity of its provisions, that it departs entirely from the ordinary course of judicial proceeding, and prescribes an extreme remedy, which is placed under the absolute control of a mere ministerial officer, that in such a case the ancient established rule is in favour of a strict construction; my own judgment is satisfied that this is the true construction.

Was Mr. Randolph an officer of this description?

The process, by authority of which he is in prison, designates him as "Robert B. Randolph, late acting purser of the United States frigate Constitution." The word acting, qualifies the word purser, and shows that he did not hold that office under a regular appointment, but for the time being, during the existing emergency. The omission to include his sureties in the warrant, as the law directs, shows that he had given no sureties; and this fact, unexplained, is evidence that no official bond, with sureties, was required. It might be added, that the explanatory accounts, to some of which reference is made in the warrant, prove with sufficient clearness that Mr. Timberlake was purser of the frigate Constitution, then cruising in the Mediterranean, and that on his death, Lieutenant Randolph was directed to perform the duties of purser during the cruise. It is then apparent, that he was a mere acting, and not a regular purser.

Mr. Nicholas has contended, with much plausibility, that having taken upon himself the office, he takes upon himself also all its responsibilities. This argument is true to a certain extent, and, as far as respects responsibility alone, is unanswerable. In a regular proceeding against Mr. Randolph, no person will be hardy enough to deny his responsibility to the same extent as if he had been a regular purser.

It is not his responsibility to the United States, but his liability to this particular process, which is the subject of inquiry. Is a mere acting purser designated by this law as one of those officers against whom this summary process may be used? It is

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in vain to say that he comes within the same reason, and is within the mischief against which the statute intended to provide. The statute does not reach all public debtors, and has selected especially those for which it is intended. No others can be brought within its purview. Those principles of strict construction, which apply, I think, to all laws restrictive of common right, forbid it.

These reasons satisfy my own judgment, that Mr. Randolph was not an officer to whom the law applies the process under which he is imprisoned.

If it were necessary to assign any reasons for this distinction between temporary and permanent officers, it would not be difficult to find them. The permanent officer usually receives his money from the treasury, or by its order, so that the document which charges him, appears on the books of that department. The temporary officer will seldom be placed under the same circumstances. He may, and generally does, receive the money with which he is chargeable, in such a manner as to leave the amount a subject of controversy. In this particular case, Purser Timberlake must stand charged, I presume, with all the moneys advanced to the purser of the Constitution. The portion of this money which came to the hands of Mr. Randolph, would not appear on those books, and may be a matter of controversy between him and Timberlake's representatives. Congress might very reasonably make a distinction, when giving this summary process, between an officer whose whole liability ought to appear on the books of the department, and an agent whose liability was most generally to be ascertained by extrinsic testimony. But it is enough for me, that the law, in my judgment, makes the distinction.

The accounts extracted from the books of the treasury, and laid before the Court, furnish other matter for serious consideration.

The second section of the act requires, that the account stated by order of the first comptroller of the treasury, "shall exhibit *truly* the amount due to the United States." For what purpose

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was the word *truly* introduced? Surely not to prohibit the officers of the government from exhibiting an account known to be erroneous. Congress could not suspect such an atrocity. Its introduction, then, indicates the idea, that this summary process was to be used only when the true amount was certainly known to the department; when the sum of money debited to the officer appeared certain, and either no credits were claimed, or none about which a controversy existed. The amount due to the United States cannot be truly exhibited when the claim is shown by the account itself, to exceed what is really due. I do not mean to say, that the debtor is not bound to show with precision, the credits to which he is entitled. I do not mean to say how far his failure to separate payments made from his own funds, and from those of his predecessor, may deprive him in a suit at law, of the credits he claims. I mean to say, only, that the amount claimed, is not the sum *truly* due to the United States, if the account itself, shows that a smaller amount is due. The necessity of withholding the credit, may justify proceeding against the debtor in a court of justice, in which he must make good his credits; but will not, I think, justify issuing an execution, without any judicial inquiry, against the body and estate of the delinquent, for a sum confessedly more than is due.

The third section omits the word *truly*, but requires that the account shall be stated, and directs the agent of the treasury to proceed in the manner directed in the preceding section, all the provisions of which, are declared to be applicable to every officer of government, chargeable with the disbursement of public money.

It may be contended, that the provisions of the preceding section, thus adopted in the third, are those only, which relate to proceedings after the account is stated. But I do not think this the fair construction of the statute. I think the legislature can no more have intended in the one case than in the other, that a treasury execution should issue for confessedly more than is due, by which the person of the debtor should be imprisoned,

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probably interminably, and his property sold. Congress must have designed to leave such cases to the regular course of law.

If these principles be correct, let them be applied to the case before the Court.

Mr. Randolph is charged in the account on which the warrant issued, with cash left by Purser Timberlake, on board the frigate Constitution, and, according to his own confession, received by him, \$11,483.

That he must account for this sum is certain. I shall not inquire now, whether the treasury might issue an execution for it, or ought to have applied to a court of justice. I will proceed to other items of the account.

He is re-charged with slops issued by him, which belong to the estate of Mr. Timberlake, as appeared by his books.

Is this to be settled at the treasury, under this act of Congress, or does the inquiry properly belong to a court of justice?

He is charged with German linen, belonging to his private stores, which he turned into the navy store at Charleston, as slops. This item had been allowed to him on a former settlement of his accounts. It is not alleged that this linen has been returned to him. The United States may, and probably have, used it. Whether he is entitled to any, and to what credit, for this item, is a proper inquiry for a court of justice. The treasury may refuse the credit, and refer the question to a court of justice, but cannot, I think, issue an execution for it, as the case now stands.

The material item allowed in a former settlement of accounts and now re-charged, is the amount of advances on his pay-roll to officers and men, while he acted as purser of the Constitution, it now appearing by the memoranda of sales, by the evidence of Commodore Patterson, and others, and by the general state of the account, that portions of these advances were made out of the money and stores of Purser Timberlake, and out of the ship's stores.

I will not make the obvious objection to this item, that if Mr. Randolph paid the money, or sold the stores of Mr. Timberlake

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*Ex parte Randolph.*

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on his own account, he is responsible to the estate of Mr. Timberlake, and that the treasury department of the United States does not represent him, nor that credits given for money paid by Mr. Randolph as his own, cannot be rescinded by alleging that the money really belonged to another person; nor will I inquire by what authority the treasury department settles the accounts between Timberlake's representatives and Randolph. But I will say, that this entry admits, that part of the money was paid by Randolph out of his own funds, and certainly diminished his debt to the United States to that amount. Consequently, the whole amount for which execution issued was not due.

If I am correct in saying that this summary process can be used only to coerce the payment of the sum actually due, not to coerce the payment of more than is due, that such controverted question ought to be decided in a court of justice; then this warrant has been issued in a case which the law does not authorize; in a case which ought to have been submitted to a court of justice.

On both these points I am of opinion, that the agent of the treasury has exceeded the authority given by law, and consequently that the imprisonment is illegal.

I have not had time to state my opinion on the remaining point on which my brother judge has given his opinion. It is of no importance, as I concur with him on it.

Mr. Randolph is to be discharged from custody.

# **Circuit Court of the United States.**

**NORTH CAROLINA, FALL TERM, 1833.**

**REPORT**

**Hon. JOHN MARSHALL, Chief Justice of the United States.**

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## **THE UNITED STATES V. THE MARSHAL OF THE DISTRICT OF NORTH CAROLINA.**

A deed executed by a debtor of the United States, conveying all the property in the possession of the debtor to trustees, for the payment of his debts, not including the debt to the United States, is an act of insolvency, both within the spirit and letter of the act of Congress, giving priority, in such cases, to debts due to the United States over all others, and the priority attaches at the instant that the deed is executed.

If, subsequent to the execution of the deed, the debtor recovers property in right of his wife, in a regular course of legal proceeding, it seems, that the subsequent recovery cannot defeat the priority of the United States, which was created by the deed, however large the amount of the property recovered, compared with that conveyed by the deed.

But if the relative value of the after-acquired property be inconsiderable, it is clear, that it cannot affect the pre-existing priority of the United States. Where a "a trivial portion of the estate of the debtor," in his possession when the deed is made, is not conveyed by the deed, this is still an act of insolvency within the act, and the reservation of such "trivial portion," will not prevent the conse-



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quent priority of the United States from attaching: *a fortiori*, where such "trivial portion" is reduced into the possession of the debtor, after the execution of the deed. And the priority of the United States extends to this after-acquired property.

Whether the property of a debtor of the United States, which is omitted in a deed, which otherwise would create a legal insolvency, be so inconsiderable as to evidence an intent to evade the act, is a question which must be referred in every case in which it arises, to the sound discretion of the court.

MARSHALL, C. J.—This is an appeal from a decree of the district court, for the district of Albemarle, on a motion to direct the marshal to pay to the United States the sum of \$378 75, levied under an execution, sued out by the United States, against James Iredell Tredwell, and others.

The case was as follows:

The United States obtained a judgment against Tredwell, in October, 1829, on a bond executed in February, 1828. An execution was issued and delivered to William D. Roscoe, deputy marshal, on the 24th of October, 1829, who, on the same day, levied it on a negro woman and three children.

The state bank of North Carolina obtained a judgment against Tredwell, in September, 1828, and issued executions thereon from term to term, the last of which was delivered to the said William D. Roscoe, who was also sheriff of the county, and who, as sheriff, levied the said execution on the said slaves, on the same day on which he had, as deputy marshal, levied the execution of the United States. On the 4th of November following, the slaves were sold under both executions, and the money brought into court.

On the 7th day of June, 1828, the said James Iredell Tredwell, conveyed certain enumerated lands, slaves, and other personal property, in trust, for the payment of debts, specified in the deed, among which the debt due to the United States was not included. The deed does not profess, in terms, to convey, but does in fact convey all the property in possession of the said Tredwell. The negro woman and her children are not comprehended in it, nor were they at the time in Tredwell's pos-

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session. They were recovered in October, 1829, by the judgment of the court, in a suit brought by Tredwell and wife, and were delivered on the 23d day of the same month, never having been previously in possession of himself or wife, but having remained until the rendition of the judgment, in the adverse possession of another, who claimed them as his own property.

The district court overruled the motion, and directed the marshal to pay the money in his hands, both as marshal and sheriff, to the state bank of North Carolina. The United States have appealed from this judgment. The bond from Tredwell to the United States having been executed previous to the deed, by which he conveyed all the property then in his possession to trustees for the payment of other debts, the question arises, whether the omission of these slaves, his right to whom was then litigating in court, withdraws this deed from the operation of the act of Congress, passed on the 3d of March, 1797, entitled, "an act to provide more effectually for the settlement of accounts between the United States and receivers of public money." The fifth section of that act declares, "that where any revenue officer or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent," "the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend as well to cases, in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed." (1)

The deed of the 7th of June, 1828, was "a voluntary assignment" of the property it conveyed, and would be the very act contemplated by the fifth section of the act of 1797, as the foundation of the priority claimed by the United States, had the deed comprehended the four slaves afterwards recovered by Tredwell, in right of his wife. These slaves not having been

(1) 1 Story's Laws U. S., ch. 74, pp. 464, 465.—[Editor.]

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reduced to possession, and even the right of the wife not having been established, could scarcely have been considered, at the date of the deed, as a part of his estate. The priority of the United States, if it exists, attached at the instant the deed was executed, and could not be defeated by the subsequent decision of the suit brought for these slaves. If the deed did not create this priority, then the property it conveyed passed immediately to the trustee for the benefit of the creditor, and no subsequent decision of the suit could retroact upon it, and subject it to the debt due to the United States. I am inclined to think, that as the deed conveyed all the property to which Tredwell was at the time entitled, that the unascertained claim of his wife, to the slaves afterwards recovered, cannot be considered as defeating the priority given by law to the United States, in all cases where their debtor shall make a voluntary assignment of his property.

If I am mistaken in this, if the four slaves had been at the time, the acknowledged property, in the actual possession of Tredwell, I should feel much difficulty in saying, that withholding them from the deed would defeat the priority of the United States.

In the *United States v. Hooe et al.*, 3 Cranch, 73, it was said, that a debtor of the United States did not, by a *bona fide* conveyance of part of his property for the security of a creditor, commit an act of insolvency, in the sense of the law. The words of the act could be satisfied only by an assignment of all his property. But the court added: "If a trivial portion of an estate should be left out, for the purpose of evading the act, it would be considered as a fraud upon the law, and the parties would not be enabled to avail themselves of such a contrivance. But where a *bona fide* conveyance of part is made, not to avoid the law, but to secure a fair creditor, the case is not within the letter or the intention of the act." (Page 91.)

This opinion was delivered in a case, in which the debtor was in possession of a considerable estate, not half of which was conveyed by the deed in controversy. The court did not

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think this a case of insolvency, contemplated by the law. The conveyance was not equivalent to an act of insolvency, in its technical sense. But in Tredwell's case, a very large property is conveyed by the deed, and only a woman with three children, worth between three and four hundred dollars, are reserved. This, in the words used by the court, in the case cited from Cranch, is but "a trivial portion of the estate," and had they been then in his possession, might have been supposed "to have been left out for the purpose of evading the act." Some difficulty would undoubtedly be often found in saying, whether property left out of a deed should be considered of such trivial amount as to evidence an intent to evade the act. But these difficulties are unavoidable, and when they occur, a court must exercise a sound discretion in deciding on them. In this case, the conveyance of the 7th of June, 1828, ought, I think, to be considered as an act of insolvency, within the true intent and meaning of the law, on which the priority of the United States attached.

I at first doubted, whether this priority reached these slaves, the right of Tredwell to whom was not then fixed. On consideration, I am of opinion, that it does reach them. Had Tredwell died after the judgment, so that they would have come to his executors as part of his estate, they would have been, by the express words of the act, subject to this priority. I cannot distinguish between the operation of the law on this property, in his own possession, and in that of his executor.

The decree of the district court is to be reversed, and the money in court paid to the United States.

## **Circuit Court of the United States.**

**VIRGINIA, NOVEMBER TERM, 1835.**

**BEFORE**

**HON. PHILIP P. BARBOUR, District Judge.(1)**

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### **CASE OF JOSE FERREIRA DOS SANTOS.**

A foreign government has no right, by the laws of nations, to demand of the government of the United States, a surrender of a citizen or subject of such foreign government, who has committed a crime in his own country, and is afterwards found within the limits of the United States. It is a right which has no existence without, and can only be secured by, a treaty stipulation.

But even if the right to demand such surrender existed, independently of a treaty stipulation, the judicial officers of the United States, have no authority to surrender the obnoxious individual, or to detain him in custody, until a formal demand for the surrender could be made by the foreign government of the executive of the United States. The judicial power of the United States, was created for the purpose of enforcing the laws of the United States, and no authority is conferred upon the federal judiciary, to assist in the execution of the penal laws of a foreign country. The case of piracy is not an exception to this general proposition, for piracy is an offence against *all* nations, against the United

(1) Judge Barbour has been promoted since the above case was decided, and is now, an associate justice of the Supreme Court of the United States.—[*Editor.*]

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States as well as others, and, moreover, the Constitution of the United States, authorizes Congress to define and punish piracy.

A BILL of indictment was sent to the grand jury at this term, by the District Attorney of the United States, against Jose Ferreira dos Santos, a subject of the queen of Portugal, which the grand jury found "not a true bill." As soon as the bill was ignored, and before the prisoner was discharged, the Chevalier de Figanière d'Morao, chargé des affaires of Portugal, by his counsel, moved the Court to detain him in custody until a formal demand for his surrender could be made by the Portuguese government of the executive of the United States. The petitioner alleged, that the prisoner had committed an atrocious murder in Portugal; and this was the ground of the application.

The case was argued by Charles Shirley Carter, on behalf of the chargé des affaires, no counsel appearing for the prisoner.

Mr. Carter said, the grand jury having found the indictment against Jose Ferreira dos Santos, the Portuguese subject now in custody, under the charge of piracy, not a true bill, he stands entitled to an order of discharge, at the hands of this Court. Before that order is entered, I now submit to the Court, in behalf, and at the instance of the chargé des affaires of Portugal, an application that he may be detained in custody, until time shall be allowed the representative of that nation, to claim of the proper authorities of this government, that he be surrendered as a fugitive from justice, in order to his being remanded to Portugal, to undergo before her tribunals, his trial for the crime of murder, which he is charged to have perpetrated within her dominions, under the most aggravating circumstances.

This application is based upon the common principle, recognised and acted upon by the enlightened of all nations: That flagrant crime ought not to be permitted to go unpunished.

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What reason can be adduced why a nation should be instrumental in giving impunity to crimes committed in a foreign state, to which its own laws attach capital punishment when committed within its own jurisdiction?

To remedy the evil presented in this question, in the absence of any treaty stipulation to the point, the doctrine of the "comity of nations," has immemorially grown up among enlightened nations, at peace with each other, recognising the right of a nation, whose laws have been violated, to claim the surrender of the fugitive violator, who has taken refuge in a foreign state; and the obligation on the part of the foreign power, within whose jurisdiction he is found, to deliver him up, on such demand by the offended nation.

This doctrine, although variously laid down by the standard authorities upon international law, it is believed, is recognised by them all. Burlamaqui, following the opinions of Grotius, lays down several propositions to illustrate it: That since the establishment of civil society, it belongs to the sovereign to punish, as he thinks proper, those transgressions of his subjects which properly interest the public: That as a sovereign is not permitted to send armed men into a foreign state to exact punishment, it is reasonable that the sovereign, in whose dominion the offender has taken shelter, should punish the criminal according to his demerits, or deliver him up to be punished at the discretion of the injured sovereign. "This," he says, "is that delivery up, of which we have so many examples in history." He controverts the opinion of Puffendorf, that the right to demand, and the obligation to surrender, a fugitive from justice, "is rather by virtue of some treaty on this head, than in consequence of common and indispensable obligation," and contends, that Puffendorf has therein, without sufficient reason, abandoned the opinion of Grotius. In fine, he asserts, "that a sovereign renders himself guilty of the crime of another, by allowing a retreat and admittance to the criminal, and screening him from punishment." (Burl. Vol. II, p. 179, sec. 23.)

Vattel sustains the doctrine, in unqualified terms, in relation

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to great offences. "Assassins, incendiaries, and robbers," he says, "are seized everywhere, at the desire of the sovereign in the place where the crime was committed, and delivered up to his justice." He even asserts the right of an offended nation to demand of a foreign state, the delivery up of one of its own subjects, by whom a flagrant offence has been committed, or to inflict on him exemplary punishment. (Vattel, B. II, ch. 6, sec. 71 to 77.)

These, are the weighty names by which this doctrine is supported. It is also fortified by the highest modern authorities; whether we look to the ablest elementary writers, or to judicial decisions. Mr. Blackstone admits, that it is left in the power of all states, to take such measures in relation to the admission of strangers, as they may think convenient, and to send them home if necessary. (1 Blackst. Com. 259.) And Chitty, (Crim. Prac. Vol. I, p. 16,) holds, "That if a person having committed a felony in a foreign country, comes into England, he may be arrested here, and conveyed, and given up to the magistrates of the country, against the laws of which, the offence was committed."

The decisions of the English courts have also been in conformity with the doctrine. In Colonel Lundy's case, (2 Vent. Rep. 314,) the defendant was arrested in Scotland, for a capital offence committed in Ireland, and it was held, that he might be sent thither for trial. In *Rex v. Kimberly*, (Strange, Rep. 848,) the defendant was committed by a single magistrate, for a felony perpetrated in Ireland, "to be detained until there should be proper means found out, to convey him to Ireland to be tried." Strange, in behalf of the prisoner, objected to the legality of the procedure. But the court declared the commitment proper, and remanded the prisoner. The case of the *East India Company v. Campbell*, (1 Ves. Sr. 246,) is to the same effect; where it was adjudged, that one may be sent from England to Calcutta to be tried, for an offence committed there.

It is objected by Chief Justice Tilghman, (in an opinion which will be brought to the notice of the court,) that these cases are



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not in point, as the countries *from*, and *to* which, the demand and surrender were made, were under a common dominion. But this objection appears not sustainable; as upon examination it will be found, that the decisions are not placed upon that ground, but looked to the general principles of international law, which, (3 Burr. 1481; 4 Burr. 2016,) constitute a part of the common law of England. Let it be remembered too, that Ireland was a distinct kingdom, at the time of the adjudications in the two cases first cited; which fact is particularly relied upon by Strange, in Kimberley's case. And in Campbell's case, it is distinctly held, (1 Ves. Sr. 247,) "That the government may send a person to answer for a crime wherever committed, that be may not involve his country, and to prevent reprisals."

Can it be doubted, that, (in the absence of the general statutory provision, making it mandatory,) any one of the states of this Union, would surrender to a sister state a heinous offender, who had escaped beyond the limits and jurisdiction of the state, whose laws had been violated? And yet, in such a case, the surrender could only proceed upon the authority of the doctrine here contended for; that from the comity existing between enlightened and independent states, at peace with each other, there has immemorially arisen a right on the part of one sovereign to demand, and an obligation on the part of the other sovereign to surrender, a common felon, flying from justice. Would a precedent, drawn from the case supposed, be entitled to less weight, than had the surrender been made to a foreign sovereignty? I apprehend not.

However this may be, the cases of *Rex v. Hutcheson*, (3 Keb. Rep. 785,) where the court refused to bail a man, committed for a murder in Portugal; and of *Muse v. Kaye*, (4 Saund. 34,) are equally pertinent, and liable to no such objection. In the last mentioned case, the doctrine contended for, is laid down in broad terms, by Heath, J., who cites also the case of a Dutch ship, which was mastered by her crew, and brought into Deal, and it was held that she might be seized,

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and sent back to Holland. "And the same," he says, "has always been the law of all civilized countries."

Nor must I pass over the reasoning of Beccarid, or lose the weight of his authority. In his Book on Crimes, p. 134, ch. 35, he holds this language:—"In the whole extent of a political state, there should be no place independent of the laws. Their power should follow every subject, as the shadow follows the body. Sanctuaries, and impunity, differ only in degree; and as the effect of punishments, depends more on their certainty, than their greatness, men are more strongly invited to crimes by sanctuaries, than they are deterred by punishment." And again, "The place of punishment can certainly be no other, than where the crime was committed." From the premises, that sanctuaries should not be allowed, and that the only proper place for punishment is where the crime was committed, it inevitably follows, that a fugitive from broken laws, wheresoever found, ought to be delivered up to be tried by the tribunals, whose just authority he has invaded.

Having taken a survey of the doctrine as it is considered abroad, let us see how it has been regarded in our own country. And here I must remark, that from peculiar political events connected with the early history of this country, the doctrine contended for, is calculated to meet a less favourable reception from this government, than perhaps, from any other civilized nation. Many of the early settlers in America, were driven from their homes by unrelenting domestic oppression, whether proceeding from party zeal, or religious phrensy. To remand such fugitives to be tried by foreign tribunals, for the crime of free-thinking in matters of politics, or religion, would have been to abandon that liberty, which by their flight, the colonists sought to establish.

Among the grievances, so feelingly set forth in our Declaration of Independence, is enumerated, that "of transporting us beyond seas, to be tried for pretended offences." From the date of the Revolution, to the close of the last war, there was no period in which the question of the surrender of *subjects*,

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claimed under some pretence or other by the British Government, did not agitate the councils, and impart bitterness to the political feelings of our citizens. These events, taken together, have been calculated, I had almost said, to make it a part of the political creed of the American people, to set their faces against the surrender to foreign authority, of any criminal, however atrocious, and under any circumstances, however aggravating. To acknowledge the obligation to surrender, in the instances last referred to, would be to yield the right, set up by Great Britain, which this government never did, and never will admit, to reclaim subjects, wheresoever found, even though engaged in the service of a foreign state; and the right consequent upon it, to invade the sovereignty of a foreign power, by pursuing such subject within her jurisdiction. But this learned court will distinguish between such a question, altogether political in its character, and that doctrine of international law which I am endeavouring to present. As widely do they differ, as the obligation from which we derive the duty to protect, and give a sanctuary to the oppressed, of which we boast; and the obligation to deliver up the guilty, which all enlightened nations acknowledge. It is only necessary for me, in reference to the case at bar, to assert the doctrine in its most limited sense; the surrender of the most flagrant offenders, of those guilty of the "*mala in se*," the crimes capitally punished by all civilized nations.

Apart from political bias, it will be found that our own courts have not dissented from the learned authorities, which I have relied on.

The first case which I find reported, is the case of Longchamps, (1 Dallas' Rep. 111,) which occurred in 1784. The surrender of Longchamps was demanded of the council of Pennsylvania, by the French ambassador, for an assault and battery, committed by him, on Monsieur de Marbois, French secretary of legation. The question was referred to the court, M'Kean, C. J. presiding. On deliberation, the surrender of Longchamps was refused; but a sentence in every way satisfactory to the

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French ambassador, was passed upon Longchamps, by the authorities of Pennsylvania, submitting him to a heavy fine, and two years imprisonment. In this case, the chief justice uses this language: "We think cases may occur, where council could '*pro bono publico*,' and to prevent atrocious offenders evading punishment, deliver them up to the justice of the country to which they belong, or where the offences were committed." (1 Dallas' Rep. 116.) This is one of the cases cited by C. J. Tilghman, as against the doctrine of surrender.

The matter of Washburn (4 Johns. Ch. Rep. 106,) occurred in 1819. In this case, Chancellor Kent, with the great ability which distinguishes his decisions, after taking a minute survey of all the authorities, sustains the doctrine to the fullest extent. "It is," he says, "the law and usage of nations, resting on the plainest principles of justice and public utility, to deliver up offenders charged with felony and other high crimes, and fleeing from the country, in which the crime was committed, into a foreign and friendly jurisdiction."

Short's case (10 Serg. and Rawle, 131,) was decided by Tilghman, C. J. in 1823. There the question was, whether a fugitive from a foreign state, could be arrested by a magistrate in Pennsylvania, on a charge by a *private individual*, of felony committed abroad, in order to his being surrendered by this government, to be tried by the foreign state. The chief justice decided that he could not; but forbore expressing an opinion whether the *executive* of the state had power to cause an arrest for the same purpose. He asserts "the undoubted right of every nation, to surrender fugitives from other states." "No man has a right to say, I will force myself upon your protection, and you shall protect me." He, nevertheless, inclines against the doctrine; and cites Lord Coke to sustain him, who (3 Just. 180,) relies upon a text from Deuteronomy—"Non trades servum Domino suo, qui ad te confugerit," a good authority against the surrender of foreign *subjects*, though not applicable to the surrender of fugitive *criminals*.

The last case which I shall bring to the notice of the court,

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is the case of Fisher, (1 American Jur. 297,) which occurred in Canada, in 1827. In this case C. J. Reid, of King's Bench, in an able opinion reviewing those last cited, adopts the reasoning of Chancellor Kent, and properly places out of view the opinions, so much relied upon by Judge Tilghman, of Mr. Jefferson, and other statesmen, (who had upon various occasions been called upon to act on applications for the surrender of foreign *subjects*,) as political in their character, and not furnishing proper precedents for judicial decision.

I confess I have not been able to discover any sound reason against the doctrine, upon which this application is based. It asserts no right to subjects within a foreign state; it invades no foreign jurisdiction; it disallows no foreign sovereignty; it proceeds upon the becoming confidence that all enlightened nations, on terms of peace, will contribute to the promotion of a great common purpose, interesting to all, and obligatory upon all, to bring flagitious offenders to merited punishment. It is fortified too, by considerations of the soundest policy. It is, indeed, our boast, that under our free institutions, an asylum is afforded to the oppressed of all nations, who fly to our protection. But shall it be extended to the common felon who, having broken the most sacred laws of his *own* country, has debarred himself from all claim to protection in ours? Will you receive among your peaceful countrymen, the assassin, whose hands are stained with recently shed blood? A regard for their safety forbids it; for, be assured, if you do, as soon as he shall feel himself secure under the too benign influence of your laws, at the first moment when it may be done with impunity, like the serpent in the bosom of the honest, but too credulous husbandman, he will aim the deadly blow at the bosoms of your own citizens!

To the argument against the doctrine of surrender, as forming part of the law of nations, drawn from the existence of treaties to the same effect, between particular states, it may be remarked, that there is not, perhaps, any principle of international law, however well understood, which may not, at some period

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have been made, between friendly powers, the ground of treaty stipulation. The extent and operation of the law of nations, however well described by Grotius or Puffendorf, are always liable to be more closely defined, to be contracted or enlarged by particular agreement, to suit the varying necessities or convenience of different nations: And these treaty provisions are, usually, but declaratory of the general law. To argue the non-existence of the general law from the existence of treaties, would be to make one nation dependent on the treaties of another, and to interfere with the convenience of all, by taking away those principles of natural law, which are mainly resorted to, and relied upon, in their intercourse, by those nations, between which, no particular treaties exist. Is the law of nations, upon any point, to be proscribed between Portugal and the United States, because a treaty stipulation defining and modifying the same, as between themselves, exists between the United States and England? Certainly not!

If the Court is satisfied that the propriety of the demand contemplated by the government of Portugal is established by the authorities which have been adduced, and that it should be followed up by the surrender of the fugitive by the proper authorities of this government, the next question which presents itself is, who are the proper authorities? What is the character of the duty that is to be performed? Is it judicial or executive? Chief Justice Tilghman, (10 Serg. & Rawle, 134,) says: "The demand of the foreign court, is addressed to none but the *executive*, and no other power than the executive, has a right to comply with that demand." But I am relieved from the necessity of going into argument, or multiplying authorities upon this point, as it has been demonstrated in the celebrated case of Jonathan Robins, that the duty is executive and not judicial. The want of treaty stipulation, which existed in that case, being supplied here by the doctrine which has been presented, the argument upon the second question in Robins's case, is equally applicable to the case at bar. Far be it from me to attempt to add a single syllable to that, the most able argument

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of the distinguished individual who so recently presided in this court. May I be permitted, in passing, to express the sincere veneration with which I regard his great talents and wisdom, (as far as my humble capacity is able to appreciate them,) and the unsurpassed purity of his character and life!

The only remaining question to be considered, is, will not this Court so far conform its action to the doctrine, as to detain the criminal in custody, until the intended demand, and surrender can be made? If the positions which I have attempted to establish, be admitted, this would seem to follow of course. Heath, Justice, uses this language: "By the comity of nations, the country in which the criminal has been found, has aided the *police* of the country, against which the crime was committed, in bringing the criminal to punishment." Chief Justice Tilghman agrees, "That this matter of delivery up, is an affair of state, in which the judges and inferior magistrates cannot act, *but as auxiliary to the executive power.*" And in the matter of Washburn, it is distinctly held, "That it is the duty of the civil magistrate to commit the fugitive from justice, to the end, that a reasonable time may be afforded for the government here, to deliver him up, or for the foreign government to make application to the proper authorities here for his surrender; but if no such application is made in a reasonable time, the prisoner will be entitled to his discharge." Indeed, it would be utterly nugatory, to admit the doctrine, and having referred the duty to the executive, to stop short, and deny or question the only means, by which it can be carried into effect.

In this case, too, the prisoner is found in the custody of the officers of this Court, and subject to its authority. Will the Court, under the circumstances suffer his discharge? I submit the question.

The Court delivered the following opinion:

BARBOUR, J.—Jose Ferreira dos Santos, a Portuguese subject, having been committed for trial before this Court, under a charge of piracy, and the grand jury having found the indict-

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ment against him not a true bill, he would be entitled to a discharge from custody, as it regards that accusation. But an application is now made, at the instance of the *chargé des affaires* of Portugal, that he may be detained, until the government of Portugal shall have time to make a demand on that of the United States, that he may be surrendered to the former, as a fugitive from justice, to be tried there, under a charge of murder; which it is alleged that he has committed in that country. And the question is, whether it is proper, or competent, for this Court to detain him in prison, for the purpose before stated?

The solution of this question depends upon that of two others: 1. Has a nation, whose citizen or subject commits a crime within its own jurisdiction, and is afterwards found within that of another, a right, by the law of nations, upon its demand, to have him delivered up by that other, for the purpose of being tried where the crime was committed? 2. If such right exist, have the judicial officers of the United States, supposing the evidence to be sufficient, any authority to act in relation to it, as auxiliary to the executive department?

As to the first point, as far as I am informed, the subject has not been before any of the federal courts of the Union. The case of Jonathan Robins is not an exception to this remark. He was, indeed, at the request of the then President of the United States, Mr. Adams the elder, delivered up by the district judge of South Carolina, to the British consul, on a charge of murder, committed by him, (Robins,) on board of a British vessel on the high seas.

But, that case depended upon the twenty-seventh article of the treaty with Great Britain, made in the year 1794, by which it was agreed, that fugitives charged with murder, or forgery, committed within the jurisdiction of either, and seeking an asylum within any of the countries of the other, should be reciprocally delivered up, in the manner and upon the terms therein stated.

The question then, in that case, as it relates to this point



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was, whether the *casus fæderis* of this article had occurred; whereas, in this case, there is no treaty stipulation, and the question must, therefore, depend upon the right of the government of Portugal to make the demand, and the consequent obligation of our government to surrender the person charged, independently of any treaty or compact between them.

There have, however, been two decisions upon the subject, made by two distinguished jurists of our country: the one, by Judge Kent, of New York; the other, by Chief Justice Tilghman, of Pennsylvania; the first, asserting the right: see the case in the matter of Daniel Washburn, 4 Johns. Ch. Ca. 106; the other, adopting a different line of reasoning, and arriving in many respects, at different conclusions: see the case of Short v. Deacon, 10 Serg. & Rawle, 126. It becomes necessary, then, to examine the question upon the principles laid down by the writers on public law, with reference to the application made of them in the two cases just cited, to the authoritative declarations of our own government, and generally, to all the bearings and relations of the subject.

Grotius asserts the right to demand, and the consequent obligation to surrender, all persons charged with crimes, who have fled to another country, whether they are citizens or subjects of that country, or foreigners, although, in practice, it is not insisted on, except in crimes against the state, or of a very heinous nature. As to lesser crimes, he says, they are connived at, unless otherwise agreed on, by treaty. In this doctrine, he is followed by Burlamaqui, Heineccius, and Wynne. Vattel, asserts the right and obligation, in case of great crimes; but speaks only as to the *subjects* of the country, on which the demand is made. And his reasoning applies to them only; because it is put upon the principle of the duty of the sovereign to prevent his subjects from doing mischief to other states, and the consequent duty to punish or surrender.

Puffendorf, on the contrary, holds the doctrine, that the obligation to deliver up a criminal, is rather in virtue of some treaty, than in consequence of a common and indispensable ob-

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ligation. Martens, after stating that a sovereign may punish foreigners who fly to his dominions, after having committed a crime in the dominions of another, as well as those who commit it in his, adds: "but in neither, is he *perfectly obliged* to send them for punishment to their own country, not even supposing them to have been condemned before their escape." He says, also, that according to modern custom, a criminal is frequently sent back to the place where the crime is committed, on the request of a power *who offers to do the like service*, and that we often see instances of this. Ward seems strongly to countenance the idea of Puffendorf.

I have thus given an abbreviated statement of these writers on public law; more detailed views of whose reasoning may be seen by reference to the works themselves, or to quotations from them, in the two cases before cited from New York and Pennsylvania. Thus much was necessary as a basis for my future reasoning. Upon the mere authority of foreign publicists, then, it would appear to be doubtful whether there was, independently of treaty, any obligation, on the part of our government, to surrender to another, a fugitive from justice. To decide the question, let us descend from these principles of abstract writers, and see what has been the practice of Europe in ancient and modern times. Lord Coke, in his 3 Inst. 180, (I quote now from 10 Serg. & Rawle,) after expressing a decided opinion against delivering up fugitives, gives us three instances of a refusal to deliver up; the first, a qualified one; the two others, absolute. Henry VII. of England, demanded of Ferdinand of Spain, the Earl of Suffolk, attainted of high treason by parliament. Ferdinand refused to deliver him, until Henry promised not to put him to death. Henry VIII. of England, demanded of the King of France, Cardinal Pool, being his subject, and attainted of treason; the demand was not complied with. Queen Elizabeth, demanded of Henry IV. of France, Morgan and others of her subjects, who had committed treason against her. He replied, that all kingdoms were free to fugitives, and it was the duty of kings to defend, every one, the liberties of his own

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kingdom; and, that Elizabeth had, not long before, received Montgomery, the Prince of Condè, and other Frenchmen. Chief Justice Tilghman adds the case of Perkin Warbeck, who had fled to Scotland, and who was refused to be delivered, although demanded by Henry VII. Chancellor Kent, in the case of Washburn, cites some cases in England, as settling the principle, and acting on the practice of surrendering fugitives.

As to Lundy's case, (2 Vent. Rep. 314,) that of the King v. Kimberley, (Strange, 848,) there cited, and the East India Company v. Campbell, (1 Ves. Sr. 247,) Chief Justice Tilghman, in my opinion, gives a satisfactory answer: It is—that the territories where the crime was committed, and to which the criminal fled, were parts of the same empire, and under one common sovereign. The King of England could have no privilege against the King of Ireland, being one and the same person.

He states, indeed, the case of *The King v. Hutcheson*, (3 Keb. Rep. 785,) who was committed on a charge of a crime committed in Portugal, and refused to be bailed, and who it was said by counsel, (in another case,) was sent to Portugal; and he refers to another, mentioned by Heath, Justice; the crew of a Dutch ship mastered the vessel, and brought her into Deal: and it was a question whether they should be seized and sent to Holland. And it was held, that they might, and the same (he said) had been the law of all civilized nations.

There is no subsequent case cited, and none is known to exist, where the British government has surrendered a fugitive. On the contrary, Mr. Jefferson, in his letter to President Washington, of November 7th, 1791, after speaking on the subject of conventions for the delivery of fugitives, says: "England has no such convention with any nation, and their laws have given no power to their executive, to surrender fugitives of any description; they are, accordingly, constantly refused; and hence, England has been the asylum of the Paolis, the La Mottes, the Calonnes; in short, *of the most atrocious offenders*, as well as of the most innocent victims, who have been able to get there." In corroboration of this, I will state, that but the other day, that

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is, on the 7th of November last, it was stated in the *Intelligencer*, that application had been made to the secretary of the home department, (England), for a warrant to arrest Bowen; but it was refused, on the ground that no treaty stipulation required such a course, and without it, it was wholly inadmissible. The case is not stated with particularity. Enough, however, appears, to show that it was not one of the atrocious class, mentioned by Grotius; that, however, is not stated as the reason, but the want of a treaty stipulation. I am not prepared to say, how far the secretary acted upon the principle stated in some of the books, that governments were in the practice of conniving at the lesser offences, or that the demand was not made by our government.

There is, indeed, a case in Canada, in 1829, where a criminal from Vermont was delivered to the authorities of that state, upon a charge of larceny committed there, upon a warrant issued by the governor of the province; he was arrested, and on *habeas corpus*, before the chief justice, it was held lawful; in his opinion, he grounds himself generally upon the authorities and cases before stated, and his decision, therefore, must stand or fall with them. It is worthy of remark, however, that this was a case of simple larceny, and not one of great atrocity, as described by Grotius, and moreover, that the arrest was grounded upon a charge, on oath, of the felony, and not upon a demand by our government; so that it would seem, that the opinion of the government at home, differed from that in the province of Canada. The opinion of European nations on this subject, is manifested by the numerous treaties made by them, containing provision for the mutual surrender of criminals.

In 1 Kent's Comm. p. 37, we are told, that treaties of this kind were made between England and Scotland in 1174, and England and France in 1308, and France and Savoy in 1378. As these were in the comparatively barbarous ages of Europe, let us come down to a period, when civilization had reached a high point. In the letter of Mr. Jefferson, before referred to, dated in 1791, he says: "The delivery of fugitives from one

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country to another, as practised by several nations, is in consequence of conventions settled between them, defining precisely the cases wherein such deliveries shall take place. I know (says he) that such conventions exist, between France and Spain, France and Sardinia, France and Germany, France and the United Netherlands; between the several sovereigns, constituting the Germanic body, and I believe very generally, between co-terminous states, on the continent of Europe." Why, let me ask, were all these treaties in ancient and modern times? I answer, either because the opinion of Puffendorf was considered right, that without a treaty stipulation, there was no obligation to surrender, or at least, the question was so unsettled, the respective rights and obligations of nations so indeterminate, and the refusal on the part of nations to surrender so frequent, that without treaty, there was no obligation at all, or none of any sort of practical value; for, what is this imperfect obligation of which the writers speak? It is the right of one to ask, which involves the right of the other to refuse, and as applied to this particular subject, that refusal had become so common, as to be almost the habitual practice, until treaties were formed concerning it. And is not the doctrine of the necessity of treaty stipulation supported, too, by the the weightiest reasons?

In the first place, in this way alone, can reciprocity be ensured; in this way alone, can it certainly be ascertained to what crimes the doctrine of surrender is to be applied. Some would apply it to all crimes, some to those against the state, or of deep atrocity. Which are of that character? The New York assembly consider simple larceny, or any crime, punishable in their state prison, as proper to surrender for, and have enacted accordingly. The treaty of 1794, between the United States and Great Britain, confines it to murder and forgery.

Moreover, as to the expense attending the case, in the treaty just cited, it is provided, that the power making the demand shall pay it.

Finally, provision can be made as to the length of time

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for which a party is to be detained, as is provided in the act of Congress in relation to fugitives from justice, from the several states.

Let us now examine the views of our own government, on this point. Mr. Jefferson, in the letter already referred to, in which he is writing to the President on the subject of a request from the government of South Carolina, that a demand should be made upon the governor of Florida, for the delivery of some fugitives, says: "The laws of the United States, like those of England, receive every fugitive, (that is, as he had just before expressed it, the most atrocious offenders, as well as the most innocent victims,) and no authority has been given to our executives to deliver them up." He states further, that the French government had been anxious to make a convention with us, authorizing them to demand their subjects coming here; that in the Consular Convention, Dr. Franklin agreed to an article, giving to their consuls a right to take and send back captains of vessels, mariners, and *passengers*. Congress refused to ratify it, until the word *passengers* was stricken out. He goes on to say, in fact, however desirable it be, that the perpetrators of crimes, acknowledged to be such by all mankind, should be delivered up to punishment; yet, it is extremely difficult to draw the line between those, and acts rendered criminal by tyrannical laws only: hence, the first step always is, a convention defining the cases where a surrender shall take place.

"If, then, the United States, (he continues), could not deliver up to Governor Quesnada, a fugitive from the laws of his country, we cannot claim, as a right, the delivery of fugitives from us; and it is worthy of consideration, whether the demand proposed to be made in Governor Pinckney's letter, should it be complied with by the other party, might not commit us disagreeably, perhaps dishonourably, in event; for I do not think, that we can take for granted, that the legislature of the United States will establish a convention for the mutual delivery of fugitives; and without a reasonable certainty that they will, I think we ought not to give Governor Quesnada any grounds to

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expect that, in a similar case, we would re-deliver fugitives from his government."

On the 12th September, 1793, Mr. Jefferson thus writes to Genet, the French minister, in answer to a demand that he had made for the delivery of fugitives:

"The laws of this country take no notice of crimes committed out of their jurisdiction. The most atrocious offender coming within their pale, is received by them as an innocent man; and they have authorized no one to seize or deliver him. The evil of protecting malefactors of every dye, is sensibly felt here, as in other countries; but, until a reformation of the criminal codes of most nations, to deliver fugitives from them, would be, to become their accomplices. The former, therefore, is viewed as the lesser evil." He goes on to say, that unless they come within the consular convention, no person in this country is authorized to deliver them; but on the contrary, they are under the protection of the laws, &c. In the course of the next year, (1794), the British treaty was made; the twenty-seventh article of which, already referred to, provided for this subject.

Thus, as well by the authoritative declarations, as by the acts of our government, the principle has been announced to the world, that the United States acknowledge no obligation to surrender fugitives, except by virtue of some treaty stipulation.

Besides the reasons common to us, with other nations which recommend the justice and utility of this doctrine, we have strong ones arising from the spirit of our institutions, and the provisions of the federal Constitution.

If, for example, we were to take Grotius as our rule, the offence which he emphatically considers as most requiring a surrender, is treason; or, as he expresses it, offences against the state.

Now, let us see what would be the practical effect of this rule? Suppose, that during the late war with Great Britain, a British born subject, who had previously emigrated to the United States, had been found fighting in our ranks, as a soldier, in Canada, and upon his return home, had been demanded by the

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British government: on their principle of perpetual allegiance, he was still a subject, and had committed treason: upon the principle of Grotius, we must have surrendered him, because he had committed, according to their laws, a crime against the state.

Let us put another case. Suppose that, in the struggle now going on in Texas, an American citizen (of whom we have many) should be found fighting against the authority of Santa Anna, and upon his return home should be demanded. Here, too, according to the rule of Grotius, we must deliver him, because he had committed a crime of state, against the present government *de facto*; and it is a settled principle with us, that we are always to take the present existing government *de facto*, as the one for the time being to be respected as the government. Can any one for a moment suppose, that in either of the cases here put, our government would surrender? Surely not. In the case in Canada, the chief justice says, that cases of this sort cannot be drawn into precedent, because the authority of the state to which the accused has fled, may well be extended to protect, rather than deliver him up to his accusers, &c. ; but is it not apparent, that this is a violation of Grotius's rule? For here is a crime of state committed against the government *de facto*; one which, if successful, is honoured by the name of revolution; if otherwise, is degraded by the epithet of rebellion, and all engaged in it are called traitors.

An attention to some of the provisions of our Constitution, will, I think, fortify this doctrine.

The second clause of the second section of the fourth article provides, that a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime. The subject of fugitives from justice was thus in the minds of the Convention, and they provided for a delivery of fugitives from the states of the Union. It may, perhaps, be fairly said, that as the Constitution was



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made for the states, and the people of the states, it had no relation in its nature to foreigners: be it so; but the principle assumed, requires us to deliver up citizens, as well as aliens. In this aspect as to citizens, it was properly within the scope of a constitutional provision; and, according to my view, provision is made in the Constitution, which, although it does not mention it by name, embraces the whole subject, both as to citizens and all others within our jurisdiction, and puts it within the control of a department of the government. It is the clause creating the treaty-making power, and the reasoning stands thus: the Constitution having given to the President and Senate the right to make treaties, without limitation in words, there is no other limitation but their discretion, except that the treaty shall not contravene the Constitution, or invade the rights of other departments.

The various provisions, securing to every person charged with crime, a trial by jury, the right to be confronted by his witnesses, the privilege of not being obliged to be a witness against himself, also, in my opinion, have an important bearing upon this subject. It may be said, that it was intended to apply to crimes against the United States; but, I think, the spirit of them should make the treaty-making power extremely cautious, even as to treaty stipulations, for surrendering our people to a government, where these privileges do not exist; but where there is no treaty, they should, in my opinion, be decisive against a surrender, in the exercise of discretion, even if the law of nations created an imperfect obligation, without a treaty stipulation. I am of opinion, then, that the government of the United States are not under any obligation to deliver the prisoner, in the absence of any treaty stipulation.

The second question is, whether the judicial officers of the United States have any authority to act in relation to it? Perhaps the conclusion at which I have arrived on the first point, might render a discussion of the other unnecessary; but as it was argued, and has been considered, and as I may have fallen into error on the first point, I will very briefly notice it. As a

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general proposition, the judicial power of a government is created for the purpose of executing *its own laws*. If in deciding upon a foreign contract, the courts of another country construe it according to the law of the place where made, and intended to be executed; as, for example, to give the interest there allowed, this is not the execution of a foreign law; but of the law of the court, which as to this case, adjudges that as the intention of the parties. As to criminal laws, I believe it is settled every where, that one country will not execute the penal laws of another; not even its revenue laws. So far is this carried in this country, that the courts of one state will not execute the penal laws, either of a sister state, or of the federal government.

The crime charged against the prisoner, is one against the laws of Portugal, not against the United States. Over the crime itself, then, the judicial officers of the United States clearly have no jurisdiction. If they have no jurisdiction over the crime, whence can they derive the authority to arrest the party charged with that crime, and detain him, with a view to a trial therefor, in another and foreign jurisdiction? I do not here enter into the second question discussed in Jonathan Robins' case, whether the duty to be performed there, was a judicial one. That was the case of a treaty. The Constitution extends the jurisdiction of its judiciary, to all cases arising under treaties, &c. That, therefore, is a totally distinct question from this, where there is no treaty, and where a judicial officer is asked to arrest, or, what is the same thing, to detain a person charged with the commission of a crime, not against the government, whose judicial power it is his duty to execute, nor for a trial, in any of the courts of that government, but for one to be had before the tribunals of a foreign country, against whose laws the alleged crime has been committed.

Let us look, for a moment, at the legislation of Congress, upon the subject of arrest in criminal cases. We are authorized to arrest for any crime or offence against the United States, for what purpose? The act of Congress informs us, that it is for trial before such court of the United States, as by that act has cognizance of the offence.

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Now, the crime with which this prisoner is charged, is not against the United States, and the arrest or detainer is avowedly asked, not for the purpose of a trial before any court of the United States.

The case of piracy is embraced by the provision of this law; for that is a crime against all nations, and amongst others, against the United States; but, moreover, the Constitution authorizes Congress to define and punish piracy. Congress has defined and provided for its punishment. We are, then, executing a law, made in pursuance of the Constitution, when we take jurisdiction of that offence.

So strict has been the doctrine, as to the judicial officers of one government executing the criminal laws of another, that, although the act of Congress authorizes state magistrates to arrest, for crimes against the United States, yet the general court of Virginia sustained the legality of their warrants, only upon the ground, that it was competent to have authorized private persons to act, and that magistrates are designated as a class of persons by their name of office.

In conclusion I will say, that the counsel who made this application, has presented it in the strongest light, which the principles of public law or the authorities enabled him to do; yet, after the best reflection which I have been able to bestow upon the subject, in the short time which I have had to consider it, I am of opinion, that, without a treaty stipulation, this government is not under any obligation to surrender a fugitive from justice, to another government, for trial; and that, as a judicial officer of the United States, I have no authority whatsoever, either to arrest or detain, with a view to such surrender.

It follows, as a consequence, that the prisoner is entitled to his discharge; and he is discharged accordingly.

# Circuit Court of the United States.

VIRGINIA, MAY TERM, 1836.

## REPORT

HON. P. P. BARBOUR, Associate Justice of the Supreme Court of the U. States.  
HON. PETER V. DANIEL, District Judge.

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### THE UNITED STATES V. MYERS ET AL.

It is a general principle of equity, that wherever a party has a *perfect* remedy at law, he cannot come into a court of equity to enforce his rights: some *defect* in the legal remedy being the very foundation of the equitable jurisdiction. But where, superadded to this legal remedy, a *trust* is expressly created, either by the deed of the parties, or by the operation of law, or both, a court of equity has a concurrent jurisdiction with the court of law; and the party may proceed, at his option, either to enforce his *legal* security, or, may come into equity to enforce the trust.

Although, a court of equity, will not interfere to adjust equities between a debtor defendant, and *his* debtor, upon a bare possibility that a resort may ultimately be had to the latter, yet, where the foundation of the suit is a trust, and the trust subject is distributed among several, the *cestui que trust*, has a right to call for an account of the trust subject, in whatever hands it may be found.

Where the jurisdiction of the federal courts has once attached, no subsequent change in the relation, or condition of the parties, in the progress of the cause,

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will *oust* that jurisdiction. The strongest considerations of utility and convenience require, that the jurisdiction being once vested, the action of the court should not be limited, but, that it should proceed to make a *final* disposition of the subject.

Where the jurisdiction depends upon the party, it is the party on the record.

The United States being plaintiffs and their debtors being entitled, by the award of commissioners under the treaty with France, to a sum of money more than adequate to the payment of their debt; *Held*: that, although the United States may *elect* to retain the amount of their debt, it is altogether discretionary with them whether they will do so or not; and the right to retain, constitutes no impediment to the prosecution of their suit in a court of equity.

THE facts of this case are briefly these:—

Moses Myers and John Myers, trading under the firms of Moses Myers & Son, and John Myers & Co., being largely indebted to the United States, for duty bonds, with Richard Drummond as their surety, by two several deeds, dated respectively in October, 1819, and March, 1820, conveyed all their property, whether real or personal, in possession and in action, to William B. Lamb and Richard Drummond, surety as aforesaid, in trust, to receive the debts due to them, and to sell and dispose of all their estate and effects, and after paying the reasonable charges of the trust, to apply the proceeds to the payment of their debts in classes, giving the preference to the debts due to the United States.

Before the execution of these deeds, the Messrs. Myers had employed Myer Myers, then in Europe, as their agent, to collect a debt due to them in Norway, and particularly specified in a schedule attached to the deeds.

A judgment at law was obtained by the United States, against the obligors in the bond, which was in part satisfied.

A portion of the debt not having been paid, the United States brought their suit in equity in this Court, at the instance, as it would seem, of Drummond, the surety in the bonds, for the purpose of recovering it out of the trust fund, making Moses and John Myers, Lamb, and Drummond, the trustees, and Myer Myers, defendants.

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A motion was made at this term, to dismiss the bill, as against Myer Myers, upon the ground, that as against him, this Court had no jurisdiction of the case.

The judges delivered their opinions as follows:

DANIEL, J.—The objections to the jurisdiction of the Court, urged by the counsel for this motion, are substantially these:

1. That this suit, although *in form*, a suit in the name and on behalf of the United States, is, *in reality*, a controversy between citizens of Virginia, and, therefore, proper for a state court only.

2. That, admitting this suit to have been properly instituted as against Moses Myers & Son, and that the United States had a direct and substantive claim against them, still that there never was just ground for joining Myer Myers as a party defendant, and this suit ought, therefore, as to him, to be dismissed.

3. That admitting the regularity of this suit, originally, as to all these defendants; yet the claim of the United States having been satisfied, the court should arrest its proceedings at this point, and not go on to adjudge the controversy as between the defendants.

1. In support of the first of these objections, it is pressed upon the court, that there never was any interest or necessity operating upon the United States to compel them to the course they have adopted. That by means of their judgment against Moses Myers & Son, and their surety, they had a perfect remedy at law, which they were bound to carry out to its utmost extent; and that the sufficiency of that security (nowhere called in question) relieved them from all necessity for resorting to other sources. For these positions, the case of *Linny v. Dare*, 2 Leigh, 588, is relied on.

The principle, that wherever there exists a right or remedy exclusively *legal*, and perfect in its character and operation, a court of equity cannot take cognizance, is fully recognised: and, it is likewise conceded, that a court of equity will never interfere merely to settle equities between a debtor, and *his* debtor, upon a bare possibility that resort may ultimately be

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had to the latter. This last principle, and nothing else, I conceive to have been settled in *Linny v. Dare*, for in that case, there was no *trust*, nor other foundation for equitable interposition. The surviving partner and his surety were both living, and recourse to them, at law, was perfectly unobstructed.

How is it with the case under examination? *Here is a trust expressly created by deed.* The United States, both by the terms of the conveyance and by operation of the statute, are made the *cestui que trust*. They have the right, I conceive, to enforce their legal security, or to proceed under the trust, *ad libitum*; and in the latter event, they have the consequent right, to call for an account of the trust subject in the hands of whomsoever it may be. In the latter event, too, the *residence* of the parties is wholly immaterial, for it is in virtue, not of the residence, but of the *character* of the plaintiffs, that the jurisdiction attaches. No importance is here yielded to the objection, that the United States are said to have sued upon notice and demand from the defendant Drummond; they had the right, upon the above view of the case, to sue independently of such requirement, though perhaps they were bound to use their right so as not to visit injury upon others. I can perceive then, neither from the pleadings, the evidence, nor the argument, that this first objection can be sustained.

2. With respect to the second objection, it would seem, that if the plaintiffs are rightfully in court, as *cestui que trust*, they have the right by regular consequence, to call for and pursue the subject, wherever it may be. I should think, that putting aside the proof or the confession of agency, for the trustees or their grantors, in the management of the subject, and simply upon the facts of possession, and indebtedness, or either of them, on the part of Myer Myers, (once admitting the right to the trust subject,) it would be competent, on principles of justice, and advisable, on the score alike of prudence or celerity, to proceed against him, conjointly with the original debtors, and their trustees. But I do not think that, upon the pleadings in this cause, Myer Myers stands, *prima facie*, in a contingent attitude

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of creditor or debtor, wholly separated from the management of this fund. It seems, on the contrary, that he has had material agency in the management of the specific subject. Whatever, then, may be his ultimate responsibility, upon a full adjustment between the parties, I must regard him as an agent, taking upon himself the management of this subject, with full notice of its connexion with the rights of the *cestui que trust*, and emphatically, therefore, liable to account whenever a settlement should be called for. This opinion is in conformity with the decisions of *Newland v. Champion*, 1 Ves. Sr., 105; *Utterston v. Mair*, 2 Ves. Jr., 95; *Alsager v. Rowley*, 6 Ves. 748; and *Burroughs v. Elton*, 11 Ves. 29.

3. The third and last point, at first view, seems encompassed with rather more of difficulty than surrounds the two former; yet, this difficulty will, it is thought, upon nearer inspection, be found to be rather in appearance than reality. It may here, too, be remarked, that the question now presented, is, at this time somewhat premature; the facts assumed for its basis, not being *formally* before the court. There is no proof, direct and certain, that the United States have received, or will receive, satisfaction of their claim against Moses Myers & Son, from any source other than the trust subject.

The objection now considered, concedes the jurisdiction of the court at the time when this suit was instituted; but insists upon the assumption of a subsequent satisfaction, as having destroyed that jurisdiction admitted to have been once perfect. The authority of the court to adjudge the rights of the parties once admitted, it may naturally be asked, how that authority can have been impaired by a recognition of the rights of, or by a satisfaction made to, either party? Such recognition or satisfaction, does not change one legal feature or principle of the case, nor the positions in which the parties stand to each other, or to the court, but is, on the contrary, rather an admission, or confirmation of all these. In the case at bar, there is not the slightest change, either of *parties*, *contracts*, or *duties*; all these remain as at the institution of the suit; what possible ground,



then, can there be, for changing the rules which were applicable to them at that period? I can perceive none whatever, in any supposed necessity for restricting the courts of the United States within their proper orbit, for that they cannot transcend, while they honestly limit their action to cases in which the United States are fairly and necessarily parties; and to such, they are imperiously bound to extend their action, whoever may be directly, or incidentally, embraced with it. If there be no paramount constitutional necessity for a change of forum, none surely can doubt the advantages as to economy, either of time or expense, of a system which terminates in a single proceeding, matters that otherwise would be drawn out in multiplied and costly litigation. A course like this, is, moreover, sanctioned by the inveterate practice of courts of equity, which, when once properly invested with jurisdiction, will never parcel out the subject of controversy to different tribunals. Should a practice like that proposed by the present motion, prevail in this Court, the mischiefs incident to its establishment, are easily anticipated. Few instances will ever occur, where the priority of the United States will be asserted, which will not involve an examination of various and conflicting interests, because such cases will almost uniformly be those of absolute insolvency, or of different creditors claiming under specific liens upon the same subject, or by substitution in the place of those who may have been preferred. Again:—where the United States may have no concern, suppose there should be several incumbrances upon the same subject, the last of whom should be a citizen of another state? In either of these cases, it would, probably, be indispensable to examine into the foundation, and to settle the rank, of the respective claims; to ascertain, by accounts to be stated, their precise extent, and to convert the subject pledged into funds applicable to some or all of the demands upon it. The representatives of all the different interests are convened, their rights adjusted, the subject converted into money and actually brought into court. What shall be done? Shall the court, dispensing justice to *some* of the parties only, turn from

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its door the residue, whom it had not only power to call, but whom it was compelled to call before it; and with their expulsion, cast from it as a waif, the remainder of the fund, to be struggled for in a different forum? The evils of such a proceeding, would, indeed, be grievous; and its absurdity most glaring, from a contrast with the admission, that over persons and subject the court *once* had complete jurisdiction; but that such jurisdiction has been taken away, the character of both parties and subject remaining wholly unchanged! But the question here discussed, appears to me not one of the first impression, or to be dependent solely upon reasonings from principle. It seems to have been considered by the Supreme Court, and by that tribunal, in effect, if not in terms, decided. Thus, in the case of Conolly et al, v. Taylor, et al., 2 Peters, 556, it is ruled, that "where there is no change of parties to a suit during its progress, a jurisdiction depending upon the condition of the parties, is governed by that condition, *as it was at the commencement of the suit.*" So, too, the case of Dunn et al. v. Clarke et al., 8 Peters, 2, cited and relied on by the counsel for this motion, appears to me to coincide with the authority just quoted, and to operate strongly, if not conclusively, against the present application. In the latter case from Peters, a judgment in ejectment had been obtained in the state of Ohio, by a citizen of Virginia against citizens of Ohio, and an injunction to this judgment at law granted: the plaintiff at law, the defendant in equity, then dying, the suit was revived in the name of his representative, *a citizen of Ohio.* Upon this case, the question of jurisdiction was raised, *the parties being then all citizens of Ohio.* The court say, that although the defendant in equity, is a citizen of Ohio, yet, he was the representative of the plaintiff at law, who was a citizen of Virginia, and "this fact," (that is, his citizenship in Ohio,) "will not deprive the court of an equitable control over the judgment." And again—"Of the action at law the Circuit Court had jurisdiction, and no change in the residence or condition of the parties can take away a jurisdiction which has once attached." Finally, regarding this motion as neither enforced by any overruling authority by which the

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judgment of this Court must be controlled, nor as consistent with justice to all the parties, I am constrained to refuse it.

BARBOUR, J., after stating the case, said:

Various points have been made in support of this motion, which I will briefly examine in the order in which they were presented.

1. It is contended, that this is substantially a contest between Drummond, the surety in the custom-house bonds, one of the trustees, and also one of the defendants, and Myer Myers, his co-defendant, and that the United States are only *nominal parties*: and, that, consequently, the Court has not jurisdiction, because they are both citizens of Virginia. If this were so, then the consequence contended for would follow. But are the United States only *nominal parties*? It is not denied, that a debt is due to them, that it was originally due from Moses Myers & Son, and that it is charged upon the fund conveyed by them in trust, and that, independently of that charge, created by the parties, the law, in case of an assignment of the debtors' whole estate, as in this case, gives them a priority of payment; and this is a bill brought to enforce that charge, and that priority in behalf of a real creditor, competent to sue in this Court.(1) I understand the term, nominal party, to import one to whom nothing is due, but who is suing in his name for the benefit of another. Now, here, there is something due to the United States, and this bill is brought to enforce the recovery, and the decree must be in favour of the United States. The counsel for the defendant relied upon the case of *Brown v. Strode*, 5 Cranch, 803. That was a suit brought by the justices of a county court, to whom, as obligees, the defendant, an executor, executed an official bond, for the faithful discharge of the duties of his office. The nominal plaintiffs and defendants were all citizens of Virginia, and yet the Supreme Court held that this Court had jurisdiction; but why? Because it appeared upon the record, that they sued, not for themselves, but for an alien creditor, having claim

(1) Story's *Laws U. S.*; ch. 74, sec. 5, p. 465. Act of March 3, 1797.—[Editor.]

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against the estate; they were, in truth, but *nominal parties*: to themselves, nothing was due: for themselves, they claimed nothing; but the suit was brought in their names, as by law it was obliged to be, for the benefit and at the relation of another, who was an *alien* creditor; the fact of his being an alien creditor, appearing, as it was necessary it should appear, upon the record, this case is in direct contrast with the one at bar, in the important particulars, that here, the United States are suing, not for another, but for themselves; not at the instance of a relator appearing upon the record, and who, under a decree in their name, would receive the amount; but prosecuting *their own claim*, at the request, indeed, as appears from Drummond's answer, of one of the defendants, in the spirit of a liberal justice, to make the burden fall where it ought to rest. If this would make the person at whose instance this course is pursued, the substantial party, as well might it be said, that if a principal and surety were to execute a joint and several bond, and the creditor were, at the instance of the surety, to prosecute his action against the principal only, that the surety was the substantial party plaintiff.

We consider the principle settled, nay, it is said, in 4 Condensed Rep. 128, that it may be laid down as a rule without exception, that in all cases where the jurisdiction depends on the party, it is the party on the record. Now, the party plaintiff here, is the United States, who are undoubtedly competent to sue here as plaintiffs; and all the defendants, as far as the jurisdiction depends on citizenship, are citizens of Virginia, and, considered in that respect only, are clearly suable here as defendants.

2. It is argued, that the court cannot take jurisdiction of this case, because the United States having obtained judgment, for their claim against Drummond, the surety, who is solvent, they have complete remedy at law.

Let us examine the application of this principle to this case. It is, indeed, enacted by the sixteenth section of the judiciary act, that suits in equity shall not be sustained in either of the courts of the United States, where plain, adequate, and complete

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remedy may be had at law. (1 Story's Laws U. S., 59.) It has been decided, again and again, that this is nothing but an affirmation of the well known principle of equity; and it is said in 3 Peters, 210, (*Boyce's Executors v. Grundy*) that to prevent resort to equity, the remedy at law must be as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity.

The principle, which we are now considering, applies to those cases in which, ordinarily, the only remedy is at law; but the party comes into equity on the ground, that by reason of some impediment in the way, or some unfair legal advantage acquired by his adversary, justice cannot be done him at law. The court inquires, whether such impediment, or legal advantage exists; and, accordingly, as it *does*, or *does not*, grants, or withholds relief. But it does not apply to those cases, in which the courts of equity and law, have a concurrent jurisdiction. In those cases, although the concurrent jurisdiction of the court of equity most probably originated, from the consideration, that there *was not*, or *might not be*, an adequate remedy at law, yet where that concurrent jurisdiction has been established, if a party elect to come into a court of equity, it is no objection to its jurisdiction in the given case, that the party might have remedy at law, even, although, in that particular case, the remedy might be adequate. Thus, if one man appoint another his bailiff, or receiver, I suppose there is no doubt that if money be received, and not accounted for, the party may bring a suit in equity for an account, or an action of account or assumpsit at law; and the equity jurisdiction will not be ousted, because these concurrent remedies lie at law. Again:—a party may now have remedy at law upon a lost bond; but that does not oust the ancient equity jurisdiction. But what is more in point, is, the case put by Mr. Johnson, which is admitted in all the books, that if a party have a mortgage and a bond for the same debt, he may even pursue both simultaneously, until he gets satisfaction. That is, in effect, the case here; for here, there is a specific lien, which places this case upon the same footing

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with the mortgage. If it were true, that where the United States had remedy at law, they could not be entertained in equity, then they never could come into equity, in cases of custom-house bonds, where the sureties are solvent, for they always have remedy on them at law; and yet, not to mention other cases, in *The United States v. Howland*, 4 Wheat. 108, and *Hunter v. The United States*, 5 Peters, 173, they were plaintiffs, as here, seeking to charge a trust fund, in cases of custom-house bonds, and in the first of these cases, as here, a judgment, as appeared by the bill, had been obtained against the surety; and it does not appear in the case, that he was unable to pay.

3. It is contended, that the court cannot take jurisdiction against Myer Myers, who, it is said, stands in the relation of debtor to the plaintiffs' debtors, and, as such, cannot by them be called to account; and the case has been likened to one of a debtor to a decedent's estate, against whom, it is said, and we think correctly, the creditor of the decedent can have no remedy, except under special circumstances, such for example, as collusion with the executor, &c. We do not consider the cases alike. We look upon Myer Myers as standing in the relation, not of a mere debtor, and the plaintiffs as mere common creditors at large; but if Myer Myers has received and not accounted for any portion of the trust subject, then we consider him as the actual holder of part of a fund, as to which the plaintiffs are entitled to priority of payment, by operation of law, and to a specific lien, by the deed of the parties.

Considered in this aspect, we think it can be shown on principle, that he is liable to account to the plaintiffs. But we forbear to pursue the reasoning on the subject, because we think the question is closed by authority. In *The United States v. Howland &c.* before cited, Shoemaker and Travers were indebted to the United States on duty bonds; the principals became insolvent, and assigned all their estate, particularly the cargo on board a particular ship, to pay their debts, and that to the United States first. The United States obtained a judg-

ment against the sureties, which was unsatisfied. The sureties filed their bill to subject the proceeds of that cargo to their claim, and made Howland and Allen, the owners of the ship, and who had received the proceeds of the cargo, defendants. It was objected, as here, that they were improperly made defendants, but the Supreme Court held otherwise. That we consider as a case directly in point, to prove that Myer Myers was properly made defendant. We give no opinion upon the state of his indebtedness ; at present, the inquiry is, whether we can rightfully take jurisdiction, at the instance of these plaintiffs, as against him? Whether he holds anything liable to their claim, and if so, how much, will be the subject of future inquiry?

4. It is insisted, that under the treaty with France, sums of money have been awarded to Moses and John Myers, more than the claim of the United States, which they can retain in satisfaction of their debt, and, therefore, they ought not to prosecute their claim here.

The United States may, if they elect so to do, apply so much of the money thus awarded, as will satisfy their claim. This they actually did in the case of the Spanish indemnity, by an act of Congress, providing, that no part of the sums awarded to any of their debtors, should be paid to them without retaining the amount of their debts, respectively, to the United States. Whensoever, in relation to this case, they shall elect to pursue this course, it will be then proper to consider what bearing that will have upon the subject. That, however, is not the present posture of this case ; and, we think, that the power to retain, until exercised, constitutes no impediment to the prosecution of this suit.

5. The fifth and last point, is this :—Whether it is competent for this Court to decree, as between co-defendants, in a case where plaintiffs and defendants are rightfully convened before the court, though on account of the citizenship of these defendants, one of them could not have maintained an original suit in this court against the other?

Upon this point, I acknowledge, I have felt a serious difficulty.

On the one hand, such a course seems, in some sense, to be obnoxious to the objection that the court was thus taking jurisdiction between parties *indirectly*, which they could not take *directly*.

On the other, the inconveniences of a contrary course are so great, that the argument, *ab inconvenienti*, presses with great weight. Thus, take the case of a citizen of Virginia, dying intestate, leaving all his distributees, but one, also citizens of Virginia, and also administration taken out by a citizen of Virginia. The foreign distributee brings his bill in this Court against the administrator and co-distributees. This suit is rightly instituted, both in respect to plaintiff and defendants. Must a decree be made, assigning the plaintiff only his share, making no disposition of the remainder?

Let us put another case. A citizen of Virginia, mortgages real estate in Virginia, to two or three citizens successively, and then makes a further mortgage to a citizen of another state; the last mortgagee brings his bill in this Court, against the mortgagor, and all the prior mortgagees, praying a sale of the subject, and asking that what may remain, after satisfying the previous liens, shall be applied in discharge of his debt. The subject is sold: what shall be done with the proceeds?

We incline to think, that the true principle is this: that all inquiries as to the character of parties in this Court, are, in their nature, preliminary; and, that when the Court is once satisfied that all the plaintiffs are such, as may properly come into this Court, and all the defendants are such, as may properly be brought into this Court, it is then competent to make any decree which a state court might make; in a word, that, although this Court is limited, as to the persons for whom, and against whom, it may take jurisdiction, yet, when the suit is rightly constituted, as between plaintiffs and defendants, it is not limited in its action on the whole case. And our impression is, that the cases may be explained on this principle. Thus, without going into them in detail, take the strongest one in 8 Peters, 1.(1) There, all

(1) *Dunn et al. v. Clarke et al.*; commented on *ante*, p. 522, by Daniel, J.



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the complainants, and all the defendants were citizens of Ohio; but, as it was an injunction to the Circuit Court of Ohio, the court sustained jurisdiction as against one defendant who was the representative of the plaintiff at law; but declined jurisdiction as to all the other defendants, who had not been parties to the suit at law. Even taking jurisdiction against the one, seems to be, in some degree, a departure from the strict rule, as all the parties were citizens of the same state; but it being necessary so to do, to stay the execution of their own judgment, they did so, whilst, as to the other defendants, this principle not applying, they disclaimed jurisdiction.

No case has been found deciding this very point, but there being no case the other way, considering the great inconvenience, nay, mischief, which might result from a contrary course: that it seems rather to be a question of jurisdiction between the parties, than a question of power over them, after jurisdiction vests: that here all the parties are rightly constituted: that in any state court, a decree might be made under the circumstances stated between co-defendants: that the Supreme Court has said, in 6 Peters, 761, that the cases on the question even of jurisdiction as to the parties, have gone as far as it would be proper to go, we incline to think that a decree between co-defendants, though both citizens of Virginia, may be made in this Court. The result of these views is, that the motion is overruled.



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## ABATEMENT, PLEAS IN.

A demurrer is in its nature a plea *to the action*, and will not be considered as a plea *in abatement*, though the special causes alleged for demurring be matter of abatement. The court will disregard those special causes, and considering the demurrer independently of them, will decide upon it as if they had been inserted in it. *Furniss et al. v. Ellis & Allan.* 14.

## ACTIONS ON THE CASE.

*It seems*, that actions on the case, though not within the *terms* of the *proviso* of the Act of Limitations of Virginia, are within its *equity*: and that it should be so construed as to embrace actions on the case. *The Bank of the United States v. M'Kenzie.* 393.

## ADMINISTRATION BONDS, JOINT.

Where an administration bond is joint, each administrator is a surety for the other, and is bound for the whole. But if the representatives of the co-administrator against whom a balance is reported, are not before the court, the report is *ex parte* as to them, and cannot bind them, and, consequently, cannot affect the co-administrator, whose representatives are before the court. *Green et al. v. Hanberry's Executors et al.* 403.

## ADMINISTRATORS. *See* EXECUTORS AND ADMINISTRATORS.

## ADVANCEMENT.

A *reasonable* advancement to a daughter, on her marriage, made by a parent, unembarrassed, though indebted, is not within the statute of frauds, though the donor subsequently becomes insolvent. *Hopkirk v. Randolph et al.* 132.

## AGENT.

I. *See* PRINCIPAL AND AGENT.

II. Contracts between the agent and his principal, respecting the subject of

## AGENT.

the agency, are watched with the utmost scrutiny by courts of equity; and slight circumstances, tending to show that the agent has obtained an advantage over the principal, *through the knowledge acquired by means of the agency*, and not imparted to the principal, will induce the court to set aside the contract. *Toakle v. Bailey.* 43.

## AGENT OF FORTIFICATIONS.

- I. An agent of fortifications is an officer of the United States, whose office is established by law. [See Acts of Congress of April 24th, 1816, sec. 9, and March 2d, 1821, sec. 13.] *The United States v. Maurice et al.* 96.
- II. An official bond given by an agent of fortifications, whose *appointment* was irregular, but whose *office* is established by law, though void as a statutory obligation, is valid as a contract to perform the duties appertaining to the office of agent of fortifications, and is binding on his sureties. Contract is one of the means necessary to accomplish the objects of the institution of the government, and the capacity of the United States to contract, is co-extensive with the duties and powers of government. Every contract which subserves to the performance of a duty, may be rightfully made. *Ibid.*

## AGREEMENT.

- I. To sustain the vendee's allegation that the contract was abandoned by implication, the conduct of the vendor ought to be such, as to justify a reasonable man in believing that he acquiesced. *Garnett v. Macon et al.* 185.
- II. Both on principle and authority, a specific performance will not be decreed at the instance of the vendor, unless his ability to make a title be unquestionable. *Ibid.*
- III. For, if no incumbrance be communicated to the purchaser, or known to him to exist, he must suppose himself to purchase an unincumbered estate: *Ibid.*
- IV. And, therefore, his objections to taking it need not be confined to cases of doubtful title, but may be extended to incumbrances of every description, which may embarrass him in the full enjoyment of his purchase. *Ibid.*
- V. The English court of chancery has never laid down the broad principle, that time was never important: on the contrary, the present doctrine there is, that where time is really material to the parties, the right to a specific performance may depend upon it; and the same doctrine prevails in the courts of the United States. *Ibid.*
- VI. Although mere inadequacy of price is not a sufficient ground for a court of equity to refuse its assistance, yet if an unreasonable contract be not performed according to its letter, equity will not interfere. *Ibid.*
- VII. And there is no difference between a contract, unreasonable when made, and one which becomes so afterwards, if the applicant be in fault. *Ibid.*
- VIII. The principle is, that a very great change in the value of the article is a serious objection to a decree for a specific performance, where the vendor is in fault, as it may affect the arrangement of the vendee for a compliance with the contract. *Ibid.*

## AMENDMENTS.

The plaintiffs' counsel filed a memorandum with the clerk, and the latter in filling up the writ, mistook the name of one of the plaintiffs. The clerk also drew the declaration in which the same mistake occurred. Upon a motion to amend the pleadings, it was held: 1. That the memorandum of counsel was a document by which the error in the writ might be amended, on the ground of *clerical misprision*. 2. That the error in the declaration might also be amended, *but not on the ground of clerical misprision*. It is no part of the clerical duty to prepare the declaration for counsel. In such a case, the clerk must be regarded as the agent of the attorney, and the declaration is to be treated as if it was drawn and filed by the attorney himself. Therefore, though the court should give leave to amend the declaration, *when amended*, it must be considered as a *new declaration*, and the defendants should be permitted to plead *de novo*. *Furniss et al. v. Ellis & Allan*, 14.

## APPLICATION OF PAYMENTS.

- I. The court of chancery has established it as a rule, that where the charge is general, the purchaser is not bound to see to the application of the purchase-money. *Garnett v. Macon et al.* 185.
- II. An Act of Congress, (Act of March 3, 1797, sec. 5), declares, that where a revenue officer, indebted to the United States, shall become insolvent, the debt due to the United States shall first be satisfied, and that this priority shall extend to cases where a debtor, not having a sufficient property to pay all his debts, shall make a voluntary assignment thereof. *Held*, that although this act gives to a debt due to the United States a priority over debts due to individuals, it does not give to one part of a debt due to the United States a priority over any other part of it, nor does it vest the property absolutely in the United States, though it gives them a right to pursue it for the purpose of appropriating it in payment; nor does it affect the right of the debtor to *apply a payment* of money in his hands, to either a bond debt, or a debt due by open account by him to the United States. *The United States v. Cochran et al.* 274.
- III. Therefore, where a collector of the revenue at a port, had given bond with sureties in the penalty of \$10,000, for the faithful discharge of his official duties, and being largely indebted to the United States, had made a deed of his property for their benefit, but previously thereto, had transferred \$10,000 to his sureties, and directed them to apply that money to their exoneration, and the sureties accordingly did so apply it, by paying it into the treasury, and receiving from the treasury their obligation, without any knowledge at the treasury that the money so paid had been transferred by the collector himself to his sureties: it was adjudged that by applying that payment to the extinguishment of the bond, the sureties were discharged. *Ibid.*

## ATTACHMENTS.

- I. An officer of the United States, who has levied a sum of money on an execution in favour of the United States, to whom the United States are

## ATTACHMENTS.

indebted for fees of office in a sum greater than the amount of the execution, has a right to retain it by way of set-off, and on a motion made on the part of the United States to commit the officer for failure to pay over the money so levied, he will be permitted to show that the United States are indebted to him: and if this be shown, it is sufficient cause why he should not be attached. *The United States v. Mann.* 9.

## II. See FOREIGN ATTACHMENT.

BANK OF THE UNITED STATES. See CORPORATIONS, I, II.

BASTARDY. See LEGITIMACY.

## BILLS OF EXCEPTIONS.

Where a cause is removed from an inferior to a superior tribunal, by writ of error, no fact, not stated in the bill of exceptions, will be noticed. *Pendleton Executor of Pendleton v. The United States.* 75.

## BILLS OF EXCHANGE.

- I. If the drawer of a bill of exchange has no funds in the hands of the drawee, and has no right to expect it will be paid, there being no commercial transactions between the parties, notice of non-payment and protest is unnecessary. But where the drawer has a right to expect that his bill will be honoured, as where there are running accounts between the drawer and drawee, he is entitled to notice, although, in point of fact, he had no funds in the hands of the drawee when the bill was drawn. The sound sense and justice of the exception is, that where a drawer knows he has no right to draw, and has the strongest reason to believe that the bill will not be paid, the motives for requiring notice of the dishonour do not exist, and his case comes within the reason of the exception. *Hopkirk v. Page.* 20.
- II. Where a protested bill of exchange is held up for a long time without notice of its non-payment and protest, the whole *onus probandi* is thrown upon the holder. He must prove every thing, and nothing is required from the drawer. *Ibid.*
- III. A bill of exchange was drawn in Virginia, in November, 1775, after the commencement of hostilities between Great Britain and her colonies, payable in England, which was duly protested for non-payment in June, 1776, after all intercourse between the two countries had ceased. *Held*, that a state of war dispenses with the necessity of giving notice of the non-payment and protest to the drawer, but notice of its dishonour should be given within a reasonable time after the impediment is removed. *Ibid.*
- IV. W. B., living in Virginia, draws a bill of exchange in November, 1775, on R. C. & Co., merchants in London, which was duly protested in June, 1776. W. B. died in 1777 or 1778. Payment was not demanded of the representative of W. B. till 1819, when suit was instituted on the protested bill. *Quære*, does the doctrine of presumption of payment, arising from lapse of time, which is applicable to sealed instruments, apply to a bill of exchange? *If it does*, such presumption is merely

## BILLS OF EXCHANGE.

*prima facie*, and the holder may rebut it by accounting for the time which has been permitted to elapse, and by showing the improbability that the debt has been paid. Should this presumption be rebutted, still the plaintiff shall only recover legal interest from the assertion of his claim. *Ibid.*

- V. Bills of exchange are transferable, not by force of any statute, but by the custom of merchants. Their transfer is regulated by usage, and that usage is founded in convenience. A deed, therefore, from A. to B., conveying a great number of bills, bonds, notes, &c., cannot be considered as a negotiation of the bills on mercantile principles, so as to authorize the holder to sue in his own name, though such an instrument may be considered as conveying an equitable interest, the right to receive the money. *Ibid.*

VI. See PRINCIPAL AND AGENT, II, III, IV, V, VI, VII; and PROVISIONAL PAYMENT, I, II.

## BONDS. See OBLIGATIONS.

## CHARGE.

- I. A father conveys a large portion of his estate to his sons, without valuable consideration, and directs that they shall execute bonds for a specific sum to a third person, the husband of the donor's daughter. This is virtually a charge upon the property, and is to be considered as if it was a gift from the father to his son-in-law, directly, and the latter is liable to the creditors of the father, for any moneys received by him in satisfaction of such bonds. *Hopkirk v. Randolph et al.* 132.
- II. In equity, whether the lands be charged by the will, or the bond of the ancestor, creditors must exhaust the personal estate before they can resort to the lands. *Garnett v. Macon et al.* 185.
- III. And, in such case, a decree against the executor is not conclusive, but *prima facie* evidence only, against the heir or devisee. *Ibid.*

## CHOSE IN ACTION.

A legacy, until it is recovered, is a *chose in action*, and the marital right of the husband to his wife's legacy does not attach, until it is reduced into possession. He may, indeed, sue for it, and reduce it into possession, but so long as it continues a *chose in action*, it is the property of the wife. *Gallego v. Gallego's Executor.* 285.

## CLERICAL MISPRISION. See AMENDMENTS.

## COLLECTORS, DELINQUENT.

- I. The act of Congress respecting delinquent collectors and their sureties, created a lien on the land of the parties to the official bond; but the lien cannot be enforced until all the personal estate is exhausted, and on a joint judgment obtained against all the parties to the bond, the personal estate of all, liable to the execution must be exhausted, before the land of any one of them can be reached: in other words, the land of one surety, who has no personal estate, cannot be subjected to the pay-

## COLLECTORS, DELINQUENT.

ment of any part of the judgment, while there is personal estate in the hands of another surety, *who has paid his aliquot part of the debt.* The United States v. Graves et al. 379.

- II. The process act of the United States, gives the same remedy to the United States, against the lands of delinquent collectors, that the state of Virginia gives against the lands of those against whom she has obtained a judgment. *Ibid.*

## COMMERCIAL USAGE.

Where bills are remitted by a merchant to his factor, to be converted into available funds, and the factor mingles the property of the merchant with that of others, by selling the bills on a credit, and taking a joint note, covering other sums than that stipulated to be paid for the bills, this is in accordance with the general usage, and if the parties to the note become insolvent before it is due, the factor will not be held responsible, *in consequence of the mere act of taking such joint note*, for the loss sustained by his employer. Hamilton, Donaldson & Co. v. Cunningham. 350.

## COMMISSIONERS IN CHANCERY.

A commissioner of this Court, to whom the accounts of a surviving administrator were referred for settlement, adopted the report of a former commissioner, (to whom the accounts of all the administrators had been referred), made many years before, in a distinct suit, to which there were different parties plaintiffs, and which report did not appear ever to have been acted on or approved by the court to which it was made. When the first report was made, all the administrators were living, but they had been dead long before the accounts of the surviving administrator were referred in the second suit, and the office of the surviving administrator, in the mean time, had been consumed by fire, and many of his papers destroyed with it. *Held:* That vouchers to sustain the account in such a case will not be required. The books of the administrators, if they appear to have been fairly kept, and the account of the former commissioner founded upon them, ought to be received as *prima facie* evidence, subject to be disproved, so far as either party can disprove them, or to such exception as either party may be able to sustain. Lidderdale v. Robinson. 159.

CONFUSIO BONORUM. *See* COMMERCIAL USAGE.

## CONSTITUTION OF THE UNITED STATES.

- I. The Constitution of the United States, art. 2, sec. 2, which declares that the President "shall nominate, and, by and with the consent of the Senate, shall appoint ambassadors, &c.," "and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law," taken in connexion with the subsequent clause of the same section, which authorizes Congress "by law to vest the appointment of such inferior officers as they think proper, in the



CONSTITUTION OF THE UNITED STATES.

President alone, in the courts of law, or in the heads of departments:" and with the third section of the same article, empowering the President to fill "all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session:" is interpreted to declare, that all offices under the federal government, except in cases where the Constitution itself may otherwise provide, shall be established by law. *The United States v. Maurice et al.* 96.

- II. Appointments to office can be made by the heads of department, in those cases only which Congress has authorized by law, and, therefore, the appointment of an agent of fortifications by the secretary of war, there being no act of Congress conferring that power upon that officer, is irregular. *Ibid.*

III. *See* CONSTRUCTION OF STATUTES, III.

CONSTRUCTION OF STATUTES.

- I. Where a British statute is re-enacted in this country, it is reasonable to suppose that the legislature designed to adopt, as well the settled construction which had been given to the act by the British courts, as the act itself. *Kirkpatrick et al. v. Gibson's Executors.* 388.
- II. As to the *equitable* construction of the act of limitations. *See* LIMITATIONS, STATUTE OF, III.
- III. The decision of a question involving the *constitutionality* of an act of Congress, is one of the gravest and most delicate of the judicial functions, and while the court will meet the question with firmness, where its decision is indispensable, it is the part of wisdom, and a just respect for the legislature, renders it proper, to waive it, if the case in which it arises, can be decided on other points. *Ex parte Robert B. Randolph.* 447.

IV. *See* TREASURY DEPARTMENT, III.

CONTRACTS, PUBLIC.

- I. An official bond given by an agent of fortifications, whose *appointment* was irregular, but whose *office* is established by law, though void as a statutory obligation, is valid as a contract to perform the duties appertaining to the office of agent of fortifications, and is binding on his sureties. Contract is one of the means necessary to accomplish the objects of the institution of the government, and the capacity of the United States to contract, is co-extensive with the duties and powers of government. Every contract which subserves to the performance of a duty, may be rightfully made. *The United States v. Maurice et al.* 96.
- II. It is not essential to the validity of a contract made between an individual and the government, that it should express the circumstances under which it was made, so precisely and distinctly, as to show the motives which induced it, and the objects to be effected by it. These are matter of evidence. *Ibid.*

## CONTRACTS, PUBLIC.

- III. The duty of the government to secure its debts, necessarily infers the means of securing them, and sureties may therefore be required to the bond given by the debtor. *Ibid.*
- IV. Every contract which is legal on its face, and imports a consideration, is supposed to be entered into on valid consideration, and to be obligatory, if the parties be ostensibly able, until the contrary is shown, and the same rule applies to a government which is capable of making contracts. *Ibid.*

CONTRIBUTION. *See* SURETIES, IV.CONVEYANCES, VOLUNTARY. *See* DEED.

## CORPORATIONS.

- I. The 4th section of the Act of Limitations of Virginia, limiting the right of action in certain cases, to five years after the action accrued, applies as well to corporations as to individuals. That section has reference, not to the character of the *plaintiff*, but to the nature of the *action*. The Bank of the United States v. M'Kenzie. 393.
- II. A note was discounted at the Branch Bank of the United States, at Richmond, and after it arrived at maturity, was regularly protested for non-payment. An action on the case being brought by the Bank against the endorser to recover the amount of the note, *more than five years* from the date of the protest, the defendant pleaded the Act of Limitations. *Held*: That the right of action is barred by lapse of time, the plaintiffs not being, in the sense of the saving of the act, "beyond the seas, or out of the country." The contract having been made in Richmond, in their banking-house there, between the president and directors of the branch bank, and the defendant, the fact of there being an office of discount and deposit of the Bank of the United States, in Richmond, and of the residence of the president and directors of the branch being fixed there, must be considered, with reference to this contract, as fixing the residence of *the corporation itself* in Richmond, and not in Philadelphia, so far as the saving of the act applies to the *locality* of the plaintiff. *Ibid.*

## COVENANT.

To avoid circuitry of action, a covenant may be pleaded as a release; but it must be a covenant between those parties only; and if it contains no words of release, it will not be construed such, unless it gives the covenantee a right of action which will precisely countervail that to which he is liable; and unless, too, it was the intention of the parties that the last instrument should defeat the first. Garnett, Executor of Brooks v. Macon et al. 185.

CUSTOM OF MERCHANTS. *See* COMMERCIAL USAGE.DEBTOR AND CREDITOR. *See* PROVISIONAL PAYMENT, I, II.

## DECREE.

- I. *See* EVIDENCE, III, IV, VI.

## DECREE.

- II. Errors in an *interlocutory* decree are amendable *on motion*, but if the decree be *final*, its errors can only be corrected by a *bill of review*. *Green et al. v. Hanberry's Executors et al.* 403.

## III. See INJUNCTION, I.

- IV. Where a decree directs an officer of the court to sell property, "and bring the proceeds of sale into court," and the sale is on a credit of one, two, and three years, and bonds are given for the payment of the instalments, these bonds are the immediate proceeds of sale. As a matter of convenience, they may be permitted to remain in the hands of the officer, but as matter of strict right, the creditor may require that they shall be brought into court. *Wallis v. Thornton's Administrator et al.* 422.
- V. Where bonds are made payable to the marshal of a court, he has a right to collect them. In such case, the marshal must be considered as a trustee for the creditor. *Quære*, whether the direction to take bond implies, that it shall be taken to the marshal, rather than to the creditor? Where bonds are taken, not to the marshal and his successors, but to J. P., marshal, &c., his executors, administrators, and assigns, could his successor, in the event of the marshal being changed before the money is paid, act on these bonds without an assignment? *Ibid.*
- VI. If bonds are made payable on or before the day mentioned in the condition, but the decree under which the sale is conducted, does not authorize the insertion of these words, it seems that the trustees have no right to receive the money before the day; if they had, the *cestui que trust* might be injured, without having an opportunity of providing for their safety. But, admitting that the trustees have a right to receive the money before it is due, they have no right to discount legal interest, and receive only a part of the debt. *Ibid.*

## DEED, FRAUD.

- I. It is a general principle, that a voluntary conveyance, made by a person indebted at the time, is void as to the creditors whose debts existed when the gift was made. But, though the fact of the donor's being indebted at the time of such voluntary conveyance, is a strong badge of fraud, yet where the donor's fortune was ample, and a gift made by him to his daughter at her marriage was comparatively trivial, and the husband received and retained possession of the subject of the gift; though the donor afterwards became insolvent, the Court refused to set the gift aside as fraudulent; a reasonable advancement made under such circumstances, not being embraced by the statute of frauds. *Hopkirk v. Randolph et al.* 132.
- II. *Quære*, How far the intervening marriage of the daughter would affect such a question, as between the creditors of the donor, and the husband of the daughter? Would the subsequent or contemporaneous marriage of the daughter render valid a gift which, independent of that marriage, would be void as to the antecedent creditors of the donor? *It seems*, that if the gift could be considered, in any fair construction, as the induce-

## DEED, FRAUD.

ment to the marriage, the marriage would give validity to a gift, which, otherwise, would be void as to the creditors. *Ibid.*

- III. A father conveys a large portion of his estate to his sons, without valuable consideration, and directs that they shall execute bonds for a specific sum to a third person, the husband of the donor's daughter. This is virtually a charge upon the property, and is to be considered as if it was a gift from the father to his son-in-law, directly, and the latter is liable to the creditors of the father, for any moneys received by him in satisfaction of such bonds. *Ibid.*
- IV. T. R. being possessed of a large estate, made a division of it among his three sons, A. C. R., I. R. and T. R., and in consideration thereof, directed them to execute their bonds to R. H., the husband of the donor's daughter, for £250 each. J. B. obtained a judgment against T. R., the elder, after the division of his estate. Execution on the judgment was stayed, the plaintiff entering into an agreement with A. C. R., whereby it was stipulated that A. C. R. should pay the debt in three annual instalments. T. R., the elder, and his three sons, all became insolvent before the payment of the said debt. *Held*: That the stay of execution does not discharge R. H. from his liability to pay to the creditor any money received by him in payment of the bonds, although, when the judgment was rendered, A. C. R. possessed sufficient property to satisfy it. The principle, that where any indulgence is extended by a creditor to his debtor, and the debtor subsequently becomes insolvent, the creditor loses his recourse against the surety, does not apply in favour of a mere donee. *Ibid.*
- V. *It seems*, that where a father executes a voluntary bond to his son-in-law, the obligee will not be held responsible to the prior creditors of the father, for the money actually received in payment, in whole or in part, of the bond, such voluntary bond not being within the statute of frauds. *Ibid.*
- VI. If several voluntary conveyances are made to different individuals, which are fraudulent as to creditors, the donees will not be held liable, *only* for the proportions which their respective gifts bear to the debts of the donor, but the *whole* of every such gift will be subjected to the payment of the debts of the donor. *Ibid.*
- VII. T. R. conveyed lands to his three sons, without valuable consideration, who conveyed them away to third persons. *Quere*, Are the lands in the hands of a purchaser liable to the claim of a creditor of the father? However this may be, the creditor cannot be compelled to proceed against such purchaser, and no decree would be rendered against him, in aid of a volunteer, who was able to pay the debt. *Ibid.*
- VIII. The Statute of Frauds, avoids all covinous conveyances, made with intent to delay, hinder, or defraud creditors, but does not extend to conveyances made on valuable consideration, and in good faith: therefore, where husband and wife, made a conveyance of land to trustees, for the use and benefit of the wife, in consideration of the wife's relinquishing her right of dower in other lands, for the payment of her husband's debts, although

DEED, FRAUD.

the value of the right of dower, is only about a third of the value of the land conveyed for her benefit, yet such conveyance is not absolutely void, but, in a court of law, must be adjudged to be valid. *Wright & Cooke v. Stánard.* 311.

IX. Mere inadequacy of price may be so great, as to be evidence of fraud, proper to be submitted to a jury; but is not in itself a fraud, on which a court of law will pronounce a deed to be absolutely void. *Ibid.*

X. Although a court of equity would consider the deed before described, as being held in trust for the wife, only to the value of the dower she has released, and for the creditor, as to the residue: yet in a court of law, the deed cannot be sustained in part, and avoided in part, but will be considered as entirely good. *Ibid.*

XI. W. & C. obtained a judgment at law against K., in December, 1824, and sued out an elegit in November, 1826: meanwhile, that is, in March, 1826, M., R. & G., other creditors of K, obtained a decree in the court of chancery, directing a sale of land which had been conveyed by K. to trustees, for the benefit of his wife, (made *bona fide*, and for valuable, though inadequate, consideration,) and that out of the proceeds of the sale, the trustees for the wife, should first be paid the amount of the consideration which had actually passed from the wife, and then the residue to be applied to the extinguishment of the debt of the said M., R. & G. *Held:* That the judgment creditors, W. & C., (who had their elegit executed whilst the sale was being made under the decree,) cannot recover the land in ejectment against the purchaser under the decree. *Ibid.*

DEMURRER.

A demurrer is in its nature a plea *to the action*, and will not be considered as a plea in *abatement*, though the special causes alleged for demurring be matter of abatement. The court will disregard those special causes, and considering the demurrer independently of them, will decide upon it as if they had not been inserted in it. *Furniss, Cutler & Stacey v. Ellis & Allan.* 14.

DESCRIPTION.

A conveyance to "P. H. & Son," a mercantile firm, is a sufficient description of the son to enable him to take under the deed. *Hoffman v. Porter.* 156.

DIGNITY OF DEBTS.

I. Many judgments *when assets* were rendered against administrators, and assets to a large amount subsequently came into the hands of the administrator *de bonis non*—*Held:* That these judgments retained the same rank which would belong to the particular instruments on which they were founded. The only effect of such judgments is to give priority to other debts of the same dignity, on which either no judgments or subsequent judgments were rendered. *Lidderdale v. Robinson.* 159.

II. Where there are two sureties on bills of exchange and specialties, and one of them has paid more than his proportion, and his representatives seek

## DIGNITY OF DEBTS.

contribution out of the estate of his co-surety, the surety who has overpaid will be subrogated to the rights of the creditor. Equity would, indeed, restrain him from recovering more than his proportion, but to that extent, his claim upon his co-surety is precisely as valid as upon his principal, and the representatives of the surety who has overpaid, are entitled to rank according to the dignity of the claims on which such excess was paid. The principle of substitution applies equally to cases arising between co-sureties and those between a surety and his principal. *Ibid.*

## III. See INSOLVENCY.

## DISCONTINUANCE.

Where the defendants at the rules pleaded the general issue and demurred, and the plaintiffs took issue on the plea, but refused to join in demurrer, this operated a discontinuance, under the laws of Virginia, and the plaintiffs were nonsuited, though they were permitted to reinstate their cause. *Furniss et al. v. Ellis & Allan.* 14.

## DISMISSION.

The dismissal of a suit agreed does not amount to a retraxit, and is no bar to a future suit for the same cause of action. *Hoffman v. Porter.* 156.

## DISTRIBUTIONS, STATUTE OF.

- I. The right of the wife to her distributive share of the husband's personal estate is absolute under the statute; and she does not, (as in the case of dower,) forfeit it by her conduct, however unworthy; and however reprehensible her conduct, a court of equity is bound to carry the statute into effect. *Stegall et al. v. Stegall's Administrator et al.* 256.

## II. See REFUNDING BONDS, I.

## DONEE.

## I. See DEED, FRAUD, IV.

- II. If several voluntary conveyances are made to different individuals, which are fraudulent as to creditors, the donees will not be held liable, *only* for the proportions which their respective gifts bear to the debts of the donor, but the *whole* of every such gift will be subjected to the payment of the debts of the donor. *Hopkirk v. Randolph et al.* 132.

- III. T. R. conveyed lands to his three sons, without valuable consideration, who conveyed them away to third persons. *Quære*, Are the lands in the hands of a purchaser liable to the claim of a creditor of the father? However this may be, the creditor cannot be compelled to proceed against such purchaser, and no decree would be rendered against him, in aid of a volunteer, who was able to pay the debt. *Ibid.*

## DOWER.

- I. Under the act of Assembly of Virginia, (1 Rev. Co. ch. 107, sec. 10,) which declares, that if a wife willingly leave her husband, and go away and continue with the adulterer, she shall forfeit her dower, &c.; that part of the provision which relates to her willingly leaving her husband, is satisfied by any separation which is voluntary on her part: and any sepa-

**DOWER.**

ration is voluntary which is not brought about by the husband's act, or by some constraint on her person. Therefore, where the husband wished his wife to accompany him, and she refused, although her parents objected to her going, and she excused herself on that ground, and because of reports that he was married to another woman, the separation must be considered voluntary on her part. *Stegall et al. v. Stegall's Administrator et al.* 256.

- II. The words "and go away and continue with the adulterer," are satisfied by an open state of adultery, whether the woman reside in the same house with the adulterer, or in another house: whether in her own, or a friend's house, or his; or whether with or without the ceremony of marriage: in either case, she forfeits dower. *Ibid.*

**EJECTMENT.**

Where there are several co-heirs, lessors of the plaintiff, in an action of ejectment, and joint and several demises are laid in the declaration, and one of the co-heirs, who labours under no disability, fails to bring his action within the time limited by law, though his right of recovery will be barred by the act, it will not affect his co-heirs who were under disability. The proviso of the act is *personal*, and applies to all those who labour under any of the enumerated disabilities. *Doe dem. Lewis et al. v. Barksdale.* 436.

**ELEGIT.**

- I. An action of waste is not maintainable against a tenant by elegit, either upon the principles of the common law, or under the statute law of Virginia. *Scott & Lyle v. Lenox.* 57.
- II. The lien on lands created by a judgment, is given by the statute which authorizes an elegit, and the lien depends upon the right to sue out an elegit. *Bank of the United States v. Winston et al.* 252.
- III. The lien of a judgment on which execution is stayed, dates, not from the rendition of the judgment, but from the time when execution may be sued out. *Ibid.*

**EQUITABLE ASSETS.**

- I. The will of J. L., contained the following clauses:—"In the first place, I desire that all my just debts may be paid, and for this purpose, I subject my whole estate, real and personal. In case it should be necessary for the purpose of paying my debts, to sell any part of my real estate, I give to my executors, after named, the power of so doing," "and authorize my said executors, or such of them as may act, to make conveyances to the purchaser or purchasers." "All the rest and residue of my estate, after the payment of my debts and legacies as aforesaid, I give to my two children, Andrew and Jane." The devisees of the residue, were his heirs at law. The testator J. L., having, by his will, subjected his whole estate to the payment of his debts, (which was a valid devise, sanctioned both by the principles of equity, and the act for the relief of creditors, against fraudulent devisees,) and empowered his executors, or such of them as

## EQUITABLE ASSETS.

might act, to sell his lands, and convey to the purchaser; has converted his whole real estate into *equitable assets*, subject to the payment of all his debts equally. *Black et al. v. Scott, Executor of Leslie.* 325.

II. See GUARDIAN and WARD, V.

## EQUITY.

- I. It is a general rule in equity, that all persons having distinct interests must be brought into court; but where the interest of A. is involved in that of B., and A. possesses the legal right, so that the interest may be asserted in his name, it is not always necessary to bring both before the court. *Hopkirk v. Page.* 20.
- II. A court of equity will sustain the bill of a married woman, suing by her next friend, to recover a legacy bequeathed to her, where the husband has transferred all his marital rights in the legacy to his wife. *Gallego v. Gallego's Executor.* 285.
- III. A legacy, until it is recovered, is a *chose in action*, and the marital right of the husband to his wife's legacy does not attach, until it is reduced into possession. He may, indeed, sue for it, and reduce it into possession but so long as it continues a *chose in action*, it is the property of the wife. *Ibid.*
- IV. A relinquishment by the husband, of his marital right to a legacy bequeathed to his wife, is valid as to the creditors of the husband, and a court of equity will not interpose its authority to compel the husband to reduce the legacy into his possession, for the purpose of subjecting it to their claims. *Ibid.*
- V. W. obtained a loan from the Bank of the U. S., with S. as his endorser. The note was subsequently endorsed by H., for whose indemnity for any loss which might accrue to him in consequence thereof, W., the drawer, executed a deed of trust. W. afterwards executed other deeds of trust on the same land for the security of other creditors, and, among others, of V. The deed for the benefit of H., was not recorded, but full notice of its execution was given to V. Before the deed to V. was made, he made a calculation of the amount of the prior liens, and said that the property was sufficient to pay them, and secure him. The land was sold, subject to the prior liens, for the payment of V.'s debt. V. hid the amount of his debt, and the property was struck out to him. V. afterwards died, and his executors proposed to the Bank to pay the note on which S. was endorser, on condition that the Bank would institute suit against S. for their benefit, to which terms the Bank acceded, and obtained a judgment against S. S. filed his bill, stating these circumstances of which he had no knowledge until the judgment was obtained, as he averred, and prayed an injunction, which was granted. The injunction was made perpetual. *Swan v. The Bank of the United States.* 293.

VI. See DEED, X, XI.

## EQUITY, JURISDICTION.

- I. It is a general principle of equity, that wherever a party has a *perfect re-*



EQUITY, JURISDICTION.

medy at law, he cannot come into a court of equity to enforce his rights: some defect in the legal remedy being the very foundation of the equitable jurisdiction. But where, superadded to this legal remedy, a trust is expressly created, either by the deed of the parties, or by the operation of law, or both, a court of equity has a concurrent jurisdiction with the court of law; and the party may proceed, at his option, either to enforce the legal security, or, may come into equity to enforce the trust. *The United States v. Myers et al.* 516.

- II. Although, a court of equity, will not interfere to adjust equities between a debtor defendant, and his debtor, upon a bare possibility that a resort may ultimately be had to the latter, yet, where the foundation of the suit is a trust, and the trust subject is distributed among several, the *cestui que trust*, has a right to call for an account of the trust subject, in whatever hands it may be found. *Ibid.*

III. See JURISDICTION, III.

EVIDENCE.

- I. It is a general rule, that a long acquiescence in letters containing accounts, is *prima facie* evidence of the correctness of their contents.—*Hopkirk v. Page.* 90.
- II. When a protested bill of exchange is held up for a long time without notice of its non-payment and protest, the whole *onus probandi* is thrown upon the holder. He must prove every thing, and nothing is required from the drawer. *Ibid.*
- III. In a suit brought by the United States against the representatives of a surety of M. and H., contractors to furnish rations to the troops of Virginia and Maryland, for the year 1802, a letter from the department of war, not authenticated in the form prescribed by the act of Congress, claiming advances made to the principals, up to the 6th of January, 1803, is inadmissible in evidence, and no admission of its correctness, express or implied, by the principals, can bind the surety. *Pendleton's Executor v. The United States.* 75.
- IV. Where process is to be served on the thing itself which is the subject of controversy, and where the mere possession of the thing itself by the service of that process, and making proclamation, authorizes the Court to decide upon it without notice to any individual whatever, it is a proceeding *in rem*, to which all the world are parties, and in every such case, the decree is conclusive evidence against all parties interested, though not brought before the Court by process. *Mankin v. Chandler & Co.* 125.
- V. A *foreign attachment* (under the law of Virginia, see 1 R. C. of 1819, ch. 123, p. 474), is not a proceeding *in rem*. It is a suit by a plaintiff against defendants, and a decree in such a case is conclusive evidence only against parties and privies. *Ibid.*
- VI. A commissioner of this Court, to whom the accounts of a surviving administrator were referred for settlement, adopted the report of a former commissioner, (to whom the accounts of all the administrators had been

## EVIDENCE.

referred,) made many years before, in a distinct suit, to which there were different parties plaintiffs, and which report did not appear ever to have been acted on or approved by the court to which it was made. When the first report was made, all the administrators were living, but they had been dead long before the accounts of the surviving administrator were referred in the second suit, and the office of the surviving administrator, in the mean time, had been consumed by fire, and many of his papers destroyed with it. *Held*: That vouchers to sustain the account in such a case will not be required. The books of the administrators, if they appear to have been fairly kept, and the account of the former commissioner founded upon them, ought to be received as *prima facie* evidence, subject to be disproved, so far as either party can disprove them, or to such exception as either party may be able to sustain. *Lidderdale v. Robinson*. 159.

VII. A decree against the executor is not conclusive, but *prima facie* evidence only, against the heir or devisee. *Garnett v. Macon et al*. 185.

VIII. The unsworn declarations of the mother, that her son, born six months after marriage, is the son of another man, are not admissible to prove his illegitimacy, and *a fortiori*, the declarations of that man are not admissible; if their evidence is proper, their depositions should have been taken. *Stegall et al. v. Stegall's Administrator et al*. 256.

IX. The general report of the neighbourhood on the question of legitimacy, is not to be disregarded, but its weight depends on the circumstances of the case, on the remoteness of the time when the fact occurred, and the difficulty of producing any positive evidence respecting it. *Ibid*.

X. Parol evidence is not admissible to affect the construction of a will, but it is admissible where its introduction is required by considerations extrinsic of the will, and which, necessarily, depend upon such evidence. *Gallego v. Gallego's Executor*. 285.

## EXECUTIONS.

I. See MARSHAL, I, II, III.

II. The process act of the United States gives the same remedy to the United States, against the lands of delinquent collectors, that the state of Virginia gives against the lands of those against whom she has obtained a judgment. *The United States v. Graves et al*. 379.

## EXECUTORS AND ADMINISTRATORS.

I. See WILLS, CONSTRUCTION OF, I.

II. See EVIDENCE, VII.

III. Where an administration bond is joint, one administrator is responsible for his co-administrator. *Lidderdale v. Robinson*. 159.

IV. An administrator *de bonis non*, who is also the executor of the surviving administrator, who fails for a long period of time to call the agents of the former administrators to an account, is chargeable with the whole balance appearing to be due from those agents, unless he can relieve himself from the charge of gross negligence. *Ibid*.

**EXECUTORS AND ADMINISTRATORS.**

- V. Many judgments *when assets* were rendered against administrators, and assets to a large amount subsequently came into the hands of the administrator *de bonis non*—*Held*: That these judgments retained the same rank which would belong to the particular instruments on which they were founded. The only effect of such judgments is, to give priority to other debts of the same dignity, on which either no judgment or subsequent judgments were rendered. *Ibid*.
- VI. The amount of the security which the act of assembly of Virginia, adopting the provision of the 28 and 29 Ch. 2, authorizes an administrator to take, before he makes distribution of his intestate's estate, conditioned "to refund due proportions of any debts or demands, which may afterwards appear against the intestate, and the costs attending the recovery of such debts," is within the sound discretion of the court, and need not cover the whole amount distributed. This discretion extends, it seems, to executors, though not specially named in the act. *Kirkpatrick et al. v. Gibson's Executors*. 388.
- VII. An administrator who employs an agent to manage the estate of his intestate, collect debts, &c., is responsible for the money so collected, and creditors are not bound to pursue the agent; but if there is reason to believe that the account of the agent has not been correctly settled, the administrator should be permitted to shew cause against the report, in that particular. *Green et al. v. Hanberry's Executors et al*. 403.
- VIII. Where an administration bond is joint, each administrator is a surety for the other, and is bound for the whole. But if the representatives of the co-administrator against whom a balance is reported, are not before the court, the report is *ex parte* as to them, cannot bind them, and, consequently, cannot affect the co-administrator whose representatives are before the court. *Ibid*.

**EXECUTORY DEVISE.** *See* **WILLS**, II.

**FACTOR.** *See* **PRINCIPAL AND AGENT**, II, III, IV, V, VI, VII.

**FEME COVERT.** *See* **HUSBAND AND WIFE**.

**FOREIGN ATTACHMENT.**

A foreign attachment (under the law of Virginia, see R. C. of 1819, ch. 123, p. 474), is not a proceeding *in rem*. It is a suit by a plaintiff against defendants, and a decree in such a case is conclusive evidence only against parties and privies. Thus, C. being indebted to W., gave his note for the amount, and W. assigned the note to M., and W. afterwards left the country. R., a creditor of W., attached the effects of W. in the hands of C. C. had notice of the assignment of his note to M. A decree was rendered in favour of R. M. subsequently brought suit upon the note against C., but the decree was satisfied before service of the process in the second suit. C. pleaded the decree in favour of R., in bar of M.'s right of action, and to this plea, M. demurred. The Court sustained the demurrer, on the ground, that a decree rendered in a suit between two parties, is not admissible evidence in a suit between one of

## FOREIGN ATTACHMENT.

those parties and a third party. But the Court held, that if M. had been a party to the first suit, the decree would have operated a bar, and the demurrer would have been overruled. *Mankin v. John Chandler & Co.* 125.

## FORTHCOMING BONDS.

A forthcoming bond which is forfeited, is a satisfaction of the judgment on which the execution issued; and no further proceedings can be founded on that judgment. The forthcoming bond is substituted for the original judgment, and the recourse of the plaintiff is against the parties to that bond. But, *Quære*—Does the giving such bond operate a discharge of the debt, or does it merely arrest further proceedings upon the original judgment, until the forthcoming bond shall be found to be unproductive? *The United States v. Graves et al.* 379.

## FRAUD.

- I. A relinquishment by the husband, of his marital right to a legacy bequeathed to his wife, is valid as to the creditors of the husband, and a court of equity will not interpose its authority to compel the husband to reduce the legacy into his possession, for the purpose of subjecting it to their claims. *Gallego v. Gallego's Executor.* 285.
- II. Mere inadequacy of price may be so great, as to be evidence of fraud, proper to be submitted to a jury; but is not in itself a fraud, on which a court of law will pronounce a deed absolutely void. *Wright and Cooke v. Stanard.* 311.

III. *See DEED.*FRAUDS, STATUTE OF. *See DEED.*FUGITIVES FROM JUSTICE. *See LAWS OF NATIONS.*GUARDIAN AND WARD.—*Construction of acts of assembly.*

By the law of Virginia, it is provided, that the "estate of a guardian or curator, appointed under this act, not under a specific lien, shall, after the death of such guardian or curator, be liable for whatever may be due from him or her on account of his or her guardianship, to his or her ward, before any other debt due from him or her," (see act concerning Guardians, &c., 1 Rev. Co. ch. 108, sec. 12, p. 408), and that "the executors or administrators of a guardian, of a committee, or of any other person, who shall have been chargeable with, or accountable for the estate of a ward, an idiot, or a lunatic; or the estate of a dead person, committed to their testator or intestate, by a court of record, shall pay so much as shall be due from their testator or intestate, to the ward, idiot, or lunatic, or to the legatees, or persons entitled to distribution, before any proper debt of their testator or intestate." (See act concerning Wills, Intestacy, and Distributions, 1 Rev. Co. ch. 104, sec. 60, p. 389.) *Held*:

- I. That the 12th section of the law concerning guardians, &c., and the 60th section of the act concerning wills, &c., having both been passed at the same session of the legislature, and being *in pari materia*, must be con-

## GUARDIAN AND WARD.

sidered in connexion as if they were parts of the same act; that the latter section applies only to executors and administrators, in the administration of the effects of their testator or intestate, that come to their hands in their official character, giving priority to debts due to a ward, an idiot, a lunatic, or the estate of a dead person, &c., over all others, but placing them all on the same footing with reference to each other. *Black v. Scott.* 325.

- II. That the word *estate*, in the 19th section, concerning guardians, &c., must be construed to apply *only* to the *real* estate of the guardian, for if it were applicable to the personalty also, it would give the ward the priority on the personal estate, over persons who are, by the section respecting wills, &c., expressly placed on an equal footing with him. But this act gives the priority to the debt due to the ward, to any bond debt due from the testator or intestate, on his own account. *Ibid.*
- III. But this statute does not create a *lien* on the lands of the guardian, for that would bind them in the hands of a purchaser. To give it such an interpretation, would violate the general policy of the law, in setting up a secret lien, in restraint of alienations, and is not required, either by the express words of the act, or any necessary construction of it. *Ibid.*
- IV. But, although this act does not create a *lien* on the guardian's lands, it does create a liability of the heir, or devisee, to pay the debt due to the ward on guardianship account, in consideration, and to the amount, of the land descended or devised, and does not merely give the *preference* to an existing liability. The words in the section, "the estate of a guardian, or curator, appointed under this act, shall be liable, &c.," although the comma in the printed code, is placed after the word "curator," must be read as if it was placed after the word "guardian," so as to bind the lands of *all* guardians, and not merely "guardians appointed under this act," or statutory guardians. Thus, the debt due to the ward of a *testamentary* guardian *who was not required to give bond*, would as effectually bind his lands in the hands of the heir, or devisee, under this construction of the act, as of a statutory guardian, who had given a bond binding his heirs. *Ibid.*
- V. The 19th section of the act concerning guardians, &c., before cited, having declared that "the estate of a guardian, or curator, &c., shall, &c., be liable for whatever may be due from him or her, on account of his or her guardianship, &c., ~~above~~ any other debt, &c.," although it gives priority, and creates liability if it did not before exist, can apply only to real estate, *in a condition to be reached by other debts*. The language of the section is comparative, comparing the charge it creates with other charges, and giving it the priority over them. Before the passage of the act against fraudulent devisees, lands devised, were not liable for any debt whatever, and that statute expressly protects devisees for the payment of debts, and declares them valid: it protects the trust, and leaves the estate to its operation. The act of assembly applies to legal, and not to equitable assets. *Wherever real estate is made equitable assets by the will, the equitable*

## GUARDIAN AND WARD.

*principle must prevail*, and the ward is entitled, only to his equal *portion* of the fund arising from the real estate of the guardian. *Ibid.*

## GUARDIANS, TESTAMENTARY.

What words in a will do or do not constitute an appointment of, and what acts shall or shall not be construed into acceptance of the guardianship? *See* WILLS, CONSTRUCTION OF, I.

## HABEAS CORPUS.

The act of Congress authorizing the writ of *habeas corpus* to be issued, "for the purpose of inquiring into the cause of commitment," applies as well to cases of commitment under *civil* as to those under *criminal* process. In inquiring into the extent of the power thus conferred, the courts of the United States are not required to limit the application of the writ to cases to which it is limited in England, so far as it depends upon British statutes, viz.: to cases of commitment under criminal process; but may apply it to all cases which it would reach at common law, viz.: to commitments under *civil* as well as *criminal* process; for although the common law is not a source of jurisdiction, in the courts of the United States, it is necessarily referred to for the definition and application of terms. *Ex parte Randolph.* 447.

## HEADS OF DEPARTMENT.

Appointments to office can be made by the heads of departments, in those cases only which Congress has authorized by law, and, therefore, the appointment of an agent of fortifications by the secretary of war, there being no act of Congress conferring that power upon that officer, is irregular. *The United States v. Maurice et al.* 96.

HEARSAY. *See* EVIDENCE, VIII, IX.

## HUSBAND AND WIFE.

- I. A court of equity will sustain the bill of a married woman, suing by her next friend, to recover a legacy bequeathed to her, where the husband has transferred all his marital rights in the legacy to his wife. *Gallego v. Gallego's Executor.* 285.
- II. A legacy, until it is recovered, is a *chose in action*, and the marital right of the husband to his wife's legacy does not attach, until it is reduced into possession. He may, indeed, sue for it, and reduce it into possession, but so long as it continues a *chose in action*, it is the property of the wife. *Ibid.*
- III. A relinquishment by the husband, of his marital right to a legacy bequeathed to his wife, is valid as to the creditors of the husband, and a court of equity will not interpose its authority to compel the husband to reduce the legacy into his possession, for the purpose of subjecting it to their claims. *Ibid.*
- IV. Where the testator advanced money in his lifetime to a husband, whose wife was a relation, and would be, at his death, an heir and distributee of the testator, and directed that the husband should be debited with the

## HUSBAND AND WIFE.

amount, that it might be deducted, after the testator's death "from the share coming to the family;" and the testator *afterwards* made his will, bequeathing a legacy to the wife: *Non constat*, that the testator designed that the advance made to the husband should be deducted from the legacy bequeathed to the wife. The whole legacy was decreed to be paid to the wife, without discounting the husband's debt. *Ibid.*

- V. The Statute of Frauds, avoids all covinous conveyances, made with intent to delay, hinder, or defraud creditors, but does not extend to conveyances made on valuable consideration, and in good faith: therefore, where husband and wife, made a conveyance of land to trustees, for the use and benefit of the wife, in consideration of the wife's relinquishing her right of dower in other lands, for the payment of her husband's debts, although the value of the right of dower, is only about a third of the value of the land conveyed for her benefit, yet such conveyance is not absolutely void, but, in a court of law, must be adjudged to be valid. Wright & Cooke v. Stanard. 311.
- VI. Although a court of equity would consider the deed before described, as being held in trust for the wife, only to the value of the dower she has released, and for the creditor, as to the residue: yet in a court of law, the deed cannot be sustained in part, and avoided in part, but will be considered as entirely good. *Ibid.*
- VII. W. & C. obtained a judgment at law against K., in December, 1824, and sued out an elegit in November, 1826: meanwhile, that is, in March, 1826, M., R. & G., other creditors of K., obtained a decree in the court of chancery, directing a sale of land which had been conveyed by K. to trustees, for the benefit of his wife, (made *bona fide*, and for valuable, though inadequate, consideration,) and that out of the proceeds of the sale, the trustees for the wife, should first be paid the amount of the consideration which had actually passed from the wife, and then the residue to be applied to the extinguishment of the debt of the said M., R. & G. *Held*: That the judgment creditors, W. & C., (who had their elegit executed whilst the sale was being made under the decree,) cannot recover the land in ejectment against the purchaser under the decree. *Ibid.*

## INFANTS.

Contracts respecting the lands of infants, entered into between the mother, as guardian of the infants, and a third party, though absolutely void at law, will yet be sustained in equity to the extent, (*and only to that extent*), of the equity they give for a liberal remuneration for services performed. Teakle v. Bailey. 43.

## INJUNCTION.

In a suit by sundry creditors, against the estate of their debtor, after great delays resulting from the number of parties, and the complexity of the case, a decree was rendered, establishing several of the claims, and adjusting their priorities. The administrator *de bonis non* of the debtor, at the date of the decree, was also executor of a former administrator of the estate, and claimed a large balance to be due to the estate of his tes-

## INJUNCTION.

tator, from the estate of his intestate, on his administration account. The commissioner made a favourable report on this claim, but the proper parties not being before the court, no decision was made on its validity. The decree referred to, added:—"And the Court, *without deciding that there is at this time, assets of the estate of*" the debtor, "in the hands of the administrator *de bonis non*, or, on the claim of" the administrator, &c., "to retain out of the assets in his hands, the balance he claims to be due, &c., to his testator, doth decree, &c., that the said administrator, &c., out of any assets in his hands, or to come to his hands, *applicable to the claims hereby established*: and the receiver of sundry effects and securities, &c., of the debtor's estate, &c., pay, &c." Under this decree, the receiver, without authority from the administrator *de bonis non*, transferred some securities for money due to the estate of the debtor, to the agent of one of the plaintiff creditors. To prevent the remittance of the money secured by these bonds, beyond the jurisdiction of the court, until the debt, (which, if established, would be of the highest dignity,) due to the estate of the former administrator, should be established, the legatees of that former administrator obtained an injunction. On the motion to dissolve this injunction, *Held*: 1. That it was immaterial whether the decree, under which the receiver acted, was final or not. The object and end of the injunction was, not to alter or modify the decree, but to secure the execution of that decree according to a sound construction of its import, and to prevent its violation under the semblance of being carried into execution. 2. The decree only ascertained the *amount and priorities* of the debts respectively, without averring assets or directing payment, leaving it to the administrator to determine on the applicability of the assets; and the receiver, being subordinate to the administrator, had no right to apply the assets, unless authorized by him to do so. *Motion to dissolve continued.* Green et al. v. Hanberry's Executor et al. 403.

## IN REM.

- I. Where process is to be served on the thing itself which is the subject of controversy, and where the mere possession of the thing itself by the service of that process, and making proclamation, authorizes the Court to decide upon it without notice to any individual whatever, it is a proceeding *in rem*, to which all the world are parties, and in every such case, the decree is conclusive evidence against all parties interested, though not brought before the Court by process. *Mankin v. John Chandler & Co.* 125.
- II. A *foreign attachment* (under the law of Virginia, see R. C. of 1819, ch. 123, p. 474), is not a proceeding *in rem*. It is a suit by a plaintiff against defendants, and a decree in such a case is conclusive evidence only against parties and privies. *Ibid.*

## INSOLVENCY.

- I. An Act of Congress, (Act of March 3, 1797, sec. 5), declares, that where a revenue officer, indebted to the United States, shall become insolvent, the



## INSOLVENCY.

debt due to the United States shall first be satisfied, and that this priority shall extend to cases where a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof. *Held*, that although this act gives to a debt due to the United States a priority over debts due to individuals, it does not give to one part of a debt due to the United States a priority over any other part of it: nor does it vest the property absolutely in the United States, though it gives them a right to pursue it for the purpose of appropriating it in payment; nor does it affect the right of the debtor to *apply a payment* of money in his hands, to either a bond debt, or a debt due by open account by him to the United States. *The United States v. Cochran et al.* 274.

- II. A deed executed by a debtor of the United States, conveying all the property in the possession of the debtor to trustees, for the payment of his debts, not including the debt to the United States, is an act of insolvency, both within the spirit and letter of the act of Congress, giving priority, in such cases, to debts due to the United States over all others, and the priority attaches at the instant that the deed is executed. *The United States v. The Marshal of the District of North Carolina.* 488.
- III. If, subsequent to the execution of the deed, the debtor recovers property in right of his wife, in a regular course of legal proceeding, it *seems*, that the subsequent recovery cannot defeat the priority of the United States, which was created by the deed, however large the amount of the property recovered, compared with that conveyed by the deed. *Ibid.*
- IV. But if the relative value of the after-acquired property be inconsiderable, it is clear, that it cannot affect the pre-existing priority of the United States. Where a "trivial portion of the estate of the debtor," in his *possession* when the deed is made, is not conveyed by the deed, this is still an act of insolvency within the act, and the reservation of such "trivial portion," will not prevent the consequent priority of the United States from attaching: *a fortiori*, where such "trivial portion" is reduced into the possession of the debtor, after the execution of the deed. And the priority of the United States extends to this after-acquired property. *Ibid.*
- V. Whether the property of a debtor of the United States, which is omitted in a deed, which otherwise would create a legal insolvency, be so inconsiderable as to evidence an intent to evade the act, is a question which must be referred in every case in which it arises, to the sound discretion of the court. *Ibid.*

## INTEREST.

Interest on sale demands limited to twenty years. *Byrd v. Byrd's Executor et al.* 169.

## ISSUE.

When the term "*issue*" in a will shall be considered a word of *limitation*, and not of *purchase*. *Maxwell et al. v. Call, Executor of Means et al.* 119.

## ISSUE OUT OF CHANCERY.

When an issue out of chancery should be directed to try a question of legitimacy. *Stegall et al. v. Stegall's Administrator et al.* 256

## JUDGMENT, LIEN.

- I. The lien on lands created by a judgment, is given by the statute which authorizes an *elegit*, and the lien depends upon the right to sue out an *elegit*. *Bank of the United States v. Winston's Executors et al.* 252.
- II. The lien of a judgment on which execution is stayed, dates, not from the rendition of the judgment, but from the time when execution may be sued out. *Ibid.*
- III. See FORTHCOMING BONDS.

## JUDICIAL POWER OF THE UNITED STATES. See LAWS OF NATIONS, II.

## JURISDICTION

- I. See EQUITY, JURISDICTION, I.
- II. Although a court of equity will not interfere to adjust equities between a debtor defendant, and his debtor, upon a bare possibility that a resort may ultimately be had to the latter, yet, where the foundation of the suit is a trust, and the trust subject is distributed among several, the *cestui que trust*, has a right to call for an account of the trust subject in whatever hands it may be found. *The United States v. Myers et al.* 516.
- III. Where the jurisdiction of the federal courts has once attached, no subsequent change in the relation, or condition of the parties, in the progress of the cause, will oust that jurisdiction. The strongest considerations of utility and convenience require, that the jurisdiction, being once vested, the action of the court should not be limited, but, that it should proceed to make a final disposition of the subject.

## LACHES.

- I. Where a protested bill of exchange is held up for a long time without notice of its non-payment and protest, the whole *onus probandi* is thrown upon the holder. He must prove every thing, and nothing is required from the drawer. *Hopkirk v. Page.* 20.
- II. A bill of exchange was drawn in Virginia, in November, 1775, after the commencement of hostilities between Great Britain and her colonies, payable in England, which was duly protested for non-payment in June, 1776, after all intercourse between the two countries had ceased. *Held*, that a state of war dispenses with the necessity of giving notice of the non-payment and protest to the drawer, but notice of its dishonour should be given within a reasonable time after the impediment is removed. *Ibid.*
- III. W. B., living in Virginia, draws a bill of exchange in November, 1775, on R. C. & Co., merchants in London, which was duly protested in June, 1776. W. B. died in 1777 or 1778. Payment was not demanded of the representative of W. B. till 1819, when suit was instituted on the protested bill. *Quære*, does the doctrine of presumption of payment, arising from lapse of time, which is applicable to sealed instruments, apply to a bill of exchange? *If it does*, such presumption is merely *prima facie*,

## LACHES.

and the holder may rebut it by accounting for the time which has been permitted to elapse, and by showing the improbability that the debt has been paid. Should this presumption be rebutted, still the plaintiff shall only recover legal interest from the assertion of his claim. *Ibid.*

- IV. Many judgments *when assets* were rendered against administrators, and assets to a large amount subsequently came into the hands of the administrator *de bonis non*—*Held*: That these judgments retained the same rank which would belong to the particular instruments on which they were founded. The only effect of such judgments is to give priority to other debts of the same dignity, on which either no judgments or subsequent judgments were rendered. *Lidderdale v. Robinson.* 159.
- V. An administrator who employs an agent to manage the estate of his intestate, collect debts, &c., is responsible for the money so collected, and creditors are not bound to pursue the agent; but if there is reason to believe that the account of the agent has not been correctly settled, the administrator should be permitted to show cause against the report, in that particular. *Green et al. v. Hanberry's Executors et al.* 403.

## LAWS OF NATIONS.

- I. A foreign government has no right, by the laws of nations, to demand of the government of the United States, a surrender of a citizen or subject of such foreign government, who has committed a crime in his own country, and is afterwards found within the limits of the United States. It is a right which has no existence without, and can only be secured by, a treaty stipulation. *Case of Jose Ferreira dos Santos.* 493.
- II. But even if the right to demand such surrender existed, independently of a treaty stipulation, the judicial officers of the United States, have no authority to surrender the obnoxious individual, or to detain him in custody, until a formal demand for the surrender could be made by the foreign government of the Executive of the United States. *Ibid.*

## LEGACIES AND LEGATEES—SPECIFIC, GENERAL.

I. *See* WILLS, CONSTRUCTION OF, I, III.

II. *See* MARSHALLING ASSETS.

LEGACY. *See* HUSBAND AND WIFE, I, II, III, IV.

## LEGITIMACY.

- I. The presumption of law is in favour of the legitimacy of a child born in wedlock; but this presumption may be rebutted by other testimony. It is true, that a mere *probability* of non-access by the husband is not sufficient to repel the presumption; but it is not necessary for the party objecting to the legitimacy, to prove that non-access was *impossible*. If the evidence places the non-access beyond *all reasonable doubt*, it is sufficient to repel the presumption of legitimacy. *Stegall et al. v. Stegall's Administrator et al.* 256.
- II. If a man marries a woman in such an advanced state of pregnancy, that

## LEGITIMACY.

the situation of his wife must have been known to him, it must be considered as a recognition of the child, afterwards born, as his own; any conduct of the husband after the birth, indicating a belief that the child is his, is decisive. But if the marriage takes place where the pregnancy is probably unknown; where the acquaintance between the parties most probably commenced too late for the husband, according to the law of gestation, to be the father of the child afterwards born; where the common opinion of the neighbourhood assigns the child to another man; where the boy grows up, not in the house of the husband of the woman, nor looking on him as a father, nor being considered as a son, and the reputation of the woman is not good; these are all circumstances which go strongly to repel the presumption of legitimacy. *Ibid.*

III. A court of equity should direct an issue to try the fact of legitimacy, where the circumstances above narrated are supported by the depositions in the cause. *Ibid.*

IV. The unsworn declarations of the mother, that her son, born six months after marriage, is the son of another man, are not admissible to prove his illegitimacy, and *a fortiori*, the declarations of that man are not admissible; if their evidence is proper, their depositions should have been taken. *Ibid.*

V. The general report of the neighbourhood on the question of legitimacy, is not to be disregarded, but its weight depends on the circumstances of the case, on the remoteness of the time when the fact occurred, and the difficulty of producing any positive evidence respecting it. *Ibid.*

## LIEN.

I. The lien on lands created by a judgment, is given by the statute which authorizes an *elegit*, and the lien depends upon the right to sue out an *elegit*. *Bank of the United States v. Winston et al.* 252.

II. The lien of a judgment on which execution is stayed, dates, not from the rendition of the judgment, but from the time when execution may be sued out. *Ibid.*

III. *See* GUARDIAN AND WARD, III, IV, V.

IV. The act of Congress respecting delinquent collectors and their sureties, created a lien on the land of the parties to the official bond; but the lien cannot be enforced until all the personal estate is exhausted, and on a joint judgment obtained against all the parties to the bond, the personal estate of all, liable to the execution must be exhausted, before the land of any one of them can be reached: in other words, the land of one surety, *who has no personal estate*, cannot be subjected to the payment of any part of the judgment, while there is personal estate in the hands of another surety, *who has paid his aliquot part of the debt*. *The United States v. Graves et al.* 379.

## LIMITATIONS, STATUTE OF.

I. The 4th section of the Act of Limitations of Virginia, limiting the right of action in certain cases, to five years after the action accrued, applies as well to corporations as to individuals. That section has reference, not to

## LIMITATIONS, STATUTE OF.

the character of the *plaintiff*, but to the nature of the *action*. The Bank of the United States v. M'Kenzie. 393.

- II. A note was discounted at the Branch Bank of the United States, at Richmond, and after it arrived at maturity, was regularly protested for non-payment. An action on the case being brought by the Bank against the endorser to recover the amount of the note, *more than five years* from the date of the protest, the defendant pleaded the Act of Limitations. *Held*: That the right of action is barred by lapse of time, the plaintiffs not being, in the sense of the saving of the act, "beyond the seas, or out of the country." The contract having been made in Richmond, in their banking-house there, between the president and directors of the branch bank, and the defendant, the fact of there being an office of discount and deposit of the Bank of the United States, in Richmond, and of the residence of the president and directors of the branch being fixed there, must be considered, with reference to this contract, as fixing the residence of the corporation itself in Richmond, and not in Philadelphia, so far as the saving of the act applies to the *locality* of the plaintiff. *Ibid*.
- III. *It seems*, that actions on the case, though not within the *terms* of the *proviso* of the Act of Limitations, are within its *equity*: and that it should be so construed as to embrace actions on the case. *Ibid*.
- IV. Though "The United States" is a stockholder in the Bank of the United States, and is, so far, a party in all suits to which the Bank is a party, the doctrine of *nullum tempus occurrit regi* does not apply to exempt the Bank from the operation of the Act of Limitations: for it is a well settled principle, that where a sovereign becomes a member of a trading company, it divests itself, with reference to the transactions of the company, of the prerogatives of sovereignty, and assumes the character of a private citizen. *Ibid*.
- V. In the construction of the *proviso* of the Act of Limitations, exempting persons under certain enumerated disabilities, from the operation of the act, who laboured under the disability "at the time of such right or title accrued," a subsequent disability cannot be tacked to one existing at the time, though both occurring in the same person, to prevent the statute from attaching. Doe dem. Lewis et al. v. Barksdale. 436.
- VI. Where there are several co-heirs, lessors of the plaintiff, in an action of ejectment, and joint and several demises are laid in the declaration, and one of the co-heirs, who labours under no disability, fails to bring his action within the time limited by law, though *his* right of recovery will be barred by the act, it will not affect his co-heirs who were under disability. The proviso of the act is *personal*, and applies to all those who labour under any of the enumerated disabilities. *Ibid*.

## MAIL CARRIERS.

A mail carrier is within the 18th sec. of the "Act regulating the Post-Office Establishment," subjecting to a penalty in certain cases, "persons employed in any of the departments of the General Post-Office." United States v. Belew. 280.

## MARITAL RIGHTS.

- I. A court of equity will sustain the bill of a married woman, suing by her next friend, to recover a legacy bequeathed to her, where the husband has transferred all his marital rights in the legacy to his wife. *Gallego v. Gallego*. 285.
- II. A legacy, until it is recovered, is a *chose in action*, and the marital right of the husband to his wife's legacy does not attach, until it is reduced into possession. He may, indeed, sue for it, and reduce it into possession, but so long as it continues a *chose in action*, it is the property of the wife. *Ibid*.
- III. A relinquishment by the husband, of his marital right to a legacy bequeathed to his wife, is valid as to the creditors of the husband, and a court of equity will not interpose its authority to compel the husband to reduce the legacy into his possession, for the purpose of subjecting it to their claims. *Ibid*.

## MARRIAGE.

*Quere*, how far a subsequent marriage can be considered a valuable consideration so as to protect a gift, otherwise fraudulent as to the creditors of the donor, from the operation of the statute of frauds, in a controversy between the husband of the donee and the creditor of the donor? It seems, that if the gift could be considered as the *inducement* to the marriage, equity would protect it from the creditors. *Hopkirk v. Randolph et al*. 132.

## MARSHALLING ASSETS.

- I. Where specific legacies have been sold, and the proceeds applied to the payment of debts, the specific legatees have a right to resort to the general fund for remuneration, upon the principles which regulate courts in marshalling assets. That general fund being a mixed fund, composed of the proceeds, partly of personal, and partly of real estate, not chargeable with the payment of debts, the portion of it resulting from the sale of the personalty, is liable, in the first instance, to make good such specific legacies as have been sold for debts, and, if that be insufficient, the money arising from the sale of the real estate must be applied to the same object, *so far, and so far only, as the specific legacies have been absorbed by specialty debts that bound the real estate*. *Byrd v. Byrd's Executor et al*. 169.
- II. In the application of the principle that the real estate of the testator is liable to specific legatees to the extent of the specialty debts which have been satisfied out of the specific legacies, their title to the aid of a court of equity is only co-extensive with their equity. Therefore, where specific legacies have been sold, and out of the proceeds thereof many specialty debts have been paid off in a depreciated paper currency, the measure of reimbursement from the real estate ought to be, *the whole actual loss of the personal estate*, and not the mere nominal sum advanced by it. *Ibid*.
- III. That the value of the money advanced by the personal for the real estate,

**MARSHALLING ASSETS.**

must be ascertained by the application of the scale of depreciation as fixed by law, *on the day that the personal property was sold*, and not at the time the debts were paid; that standard approximating, more nearly than any other, to the *actual loss* sustained by the personal estate. *Ibid.*

**MARSHALS.**

- I. An officer of the United States, who has levied a sum of money on an execution in favour of the United States, to whom the United States are indebted for fees of office in a sum greater than the amount of the execution, has a right to retain it by way of set-off, and on a motion made on the part of the United States to commit the officer for failure to pay over the money so levied, he will be permitted to show that the United States are indebted to him: and if this be shown, it is sufficient cause why he should not be attached. *The United States v. Mann.* 9.
- II. A marshal is liable, upon his official bond, for the failure of his deputy to serve original process; but the measure of his liability, is the extent of the injury received by the plaintiff, produced by such negligence. If the loss of the debt, be the *direct legal consequence* of the failure to serve the process, the amount of the debt is the measure of damage; but the mere failure to execute the process, does not, in itself, necessarily infer the loss of the debt to the plaintiff, by the negligence of the officer, because, the plaintiff might sue out other process, on the failure of the officer to execute the first process. The question, whether the loss of the debt *was, or was not*, the direct legal consequence of the negligence of the officer, is a question of fact, depending on circumstances, of which the jury must judge. *The United States v. Moore's Administrator.* 317.
- III. Where a writ of *capias ad respondendum*, comes to the hands of a deputy-marshal who arrests the debtor, and the debtor thereupon, pays to the deputy the amount of the debt for which he was sued, and the officer discharges the debtor from custody, and returns the writ, "debt and costs satisfied," this is not an official act which binds his principal. The deputy-marshal is a mere ministerial officer, and he has no right to adjust the debt, and make himself responsible to the plaintiff. He is bound to pursue the mandate of the writ, and that requires him to arrest the debtor, and take bail. The discharge of the debtor from custody, without taking bail, is, indeed, a misfeasance in office, for which his principal, the marshal, is responsible; but he is only responsible to the extent of the injury done to the plaintiff. The return of the deputy, shows that no bail was taken, and if, by taking out other process, the plaintiff could have secured his debt—which is a fact to be determined by the jury—the loss of the debt to the plaintiff, is not the necessary legal consequence of the conduct of the deputy, and no injury, in a legal sense, is done to the plaintiff thereby. *Ibid.*
- IV. Where a decree directs an officer of the court to sell property, "and bring the proceeds of sale into court," and the sale is on a credit of one, two, and three years, and bonds are given for the payment of the instalments,

**MARSHALS.**

these bonds are the immediate proceeds of sale. As a matter of convenience, they may be permitted to remain in the hands of the officer, but as matter of strict right, the creditor may require that they shall be brought into court. *Wallis v. Thornton's Administrator et al.* 422.

- V. Where bonds are made payable to the marshal of a court, he has a right to collect them. In such case, the marshal must be considered as a trustee for the creditor. *Quere*, whether the direction to take bond implies, that it shall be taken to the marshal, rather than to the creditor? Where bonds are taken, not to the marshal and his successors, but to J. P., marshal, &c., his executors, administrators, and assigns, could his successor, in the event of the marshal being changed before the money is paid, act on these bonds without an assignment? *Ibid.*

**NON EST FACTUM.**

A. and B. consented to become securities in an official bond. A printed paper in the usual form prepared for official bonds was signed by them. At the time that A. and B. signed it, all those parts which are usually written, including the penalty, the names of the obligors, &c., were blank; and C., the principal, had not yet signed it. A. and B. signed it with a perfect knowledge of the purpose for which it was designed, but the blanks were afterwards filled up in their absence, and without any express authority from the sureties, and the bond so executed was accepted by the proper authorities of the United States, as the official bond of C., with A. and B. as his sureties. *Held*: That such bond is not obligatory on A. and B. *The United States v. Nelson and Myers.* 64.

**NOTICE.** See **BILLS OF EXCHANGE**, I, II, III, IV.

**OBLIGATIONS.**

I. See **OFFICIAL BONDS**, I.

II. *It seems*, that where a father executes a voluntary bond to his son-in-law the obligee will not be held responsible to the prior creditors of the father, for the money actually received in payment, in whole or in part, of the bond, such voluntary bond not being within the statute of frauds. *Hopkirk v. Randolph et al.* 132.

III. Where an administration bond is joint, one administrator is responsible for his co-administrator. *Lidderdale v. Robinson.* 159.

**OFFICES AND OFFICERS, PUBLIC.**

I. The Constitution of the United States, art. 2, sec. 2, which declares that the President "shall nominate, and, by and with the consent of the Senate, shall appoint ambassadors, &c.," "and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law," taken in connexion with the subsequent clause of the same section, which authorizes Congress "by law to vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments;" and with the third section of the same article, empowering the President



## OFFICES AND OFFICERS, PUBLIC.

- to fill "all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session:" is interpreted to declare, that all offices under the federal government, except in cases where the Constitution itself may otherwise provide, shall be established by law. *The United States v. Maurice et al.* 96.
- II. An agent of fortifications is an officer of the United States, whose office is established by law. [See Acts of Congress of April 24th, 1816, sec. 9, and March 2d, 1821, sec. 13.] *Ibid.*
- III. The act of Congress, passed on the 15th of May, 1820, "providing for the better organization of the treasury department," which gives a new and summary remedy against officers of the United States, who have received public money for which they have failed to account, and against their sureties, substituted, by implication, the new and sufficient bond called for by that act, for the former bond, and discharged the sureties to the original bond, so far as respected subsequent transactions. *Ibid.*
- IV. Appointments to office can be made by the heads of department, in those cases only which Congress has authorized by law, and, therefore, the appointment of an agent of fortifications by the secretary of war, there being no act of Congress conferring that power upon that officer, is irregular. *Ibid.*
- V. An official bond given by an agent of fortifications, whose appointment was irregular, but whose office is established by law, though void as a statutory obligation, is valid as a contract to perform the duties appertaining to the office of agent of fortifications, and is binding on his sureties. Contract is one of the means necessary to accomplish the objects of the institution of the government, and the capacity of the United States to contract, is co-extensive with the duties and powers of government. Every contract which subserves to the performance of a duty, may be rightfully made. *Ibid.*
- VI. Where an appointment to office is irregular—is contrary to law and its policy, this does not absolve the person so appointed from the moral and legal obligation to account for public money, which has been placed in his hands in consequence of such appointment. *Ibid.*
- VII. See COLLECTORS, DELINQUENT, I, II.
- VIII. See TREASURY DEPARTMENT, III.

## OFFICIAL BONDS.

- I. A. and B. consented to become sureties in an official bond. A printed paper in the usual form prepared for official bonds was signed by him. At the time that A. and B. signed it, all those parts which are usually written, including the names of the obligors, &c., were blank; and C., the principal, had not yet signed it. A. and B. signed it with a perfect knowledge of the purpose for which it was designed, but the blanks were afterwards filled up in their absence, and without any express authority from the sureties, and the bond so executed was accepted by the proper authori-

## OFFICIAL BONDS.

ties of the United States, as the official bond of C., with A. and B. as his sureties. *Held*: That such bond is not obligatory on A. and B. *The United States v. Nelson and Myers.* 64.

II. *See SURETIES, I.*

- III. The act of Congress, passed on the 15th of May, 1820, "providing for the better organization of the treasury department," which gives a new and summary remedy against officers of the United States, who have received public money for which they have failed to account, and against their sureties, substituted by implication the new and sufficient bond called for by that act, for the former bond, and discharged the sureties to the original bond, so far as respected subsequent transactions. *The United States v. Maurice et al.* 96.
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- V. It is not essential to the validity of a contract made between an individual and the government, that it should express the circumstances under which it was made, so precisely and distinctly, as to show the motives which induced it, and the objects to be effected by it. These are matter of evidence. *Ibid.*
- VI. Where a collector of the revenue at a port, had given a bond with sureties in the penalty of \$10,000, for the faithful discharge of his official duties, and being largely indebted to the United States, had made a deed of his property for their benefit, but previously thereto, had transferred \$10,000 to his sureties, and directed them to apply that money to their exoneration, and the sureties accordingly did so apply it, by paying it into the treasury, and receiving from the treasury their obligation, without any knowledge at the treasury that the money so paid had been transferred by the collector himself to his sureties; it was adjudged that by applying that payment to the extinguishment of the bond, the sureties were discharged. *The United States v. Cochran et al.* 274.

## PARTIES.

- I. It is a general rule in equity, that all persons having distinct interests must be brought into court; but where the interest of A. is involved in that of B., and A. possesses the legal right, so that the interest may be asserted in his name, it is not always necessary to bring both before the court. *Hopkirk v. Page.* 20.
- II. It is the course of a court of equity to decree, in the first instance, against the party who is ultimately responsible; but this is done only where the

**PARTIES.**

parties are before the Court at the time of the decree, and their several liabilities are clearly ascertained. *Garnett v. Macon et al.* 185.

- III. A court of equity will sustain the bill of a married woman, suing by her next friend, to recover a legacy bequeathed to her, where the husband has transferred all his marital rights in the legacy to his wife. *Gallego v. Gallego's Executor.* 285.

IV. See EXECUTORS AND ADMINISTRATORS, VII.

V. See JURISDICTION, II, III.

**PATENT RIGHTS. CONSTRUCTION OF PATENT LAWS.**

1. An inventor obtained a patent for certain improvements made in the construction of the plough, and brought suit for an alleged violation of his patent-rights. In the description of those improvements which is annexed to, and made a part of the patent, after reference to the imperfections of the mould-boards formerly in use, the specification proceeds: "In order to meet and remedy the inconveniences arising from this form of structure, I form my mould-board into a different shape, and instead of working the moulding part, or face of the mould-board, to *straight lines*, my improvement is to work it to *circular or spheric lines*. By repeated experiments, I have ascertained that in one direction, viz.: from *a*, fig. 4, (the point of the share) inclining to the back part of the mould-board, the circle or segment to which the mould-board is wrought, should have *about* three times the radius of the smaller segments, represented by the letters *c, c, &c.*, the former being about thirty-six inches, the latter twelve." After a detailed description of the new mould board, the specification proceeds: "This being thus worked off, uniformly forms a *section of a loxodromic or spiral curve*, and when applied to practice, is found to fit or embrace every part of the furrow-slice far more than any other shaped plough, &c." *Held*:

1. That this patent must be construed, not as extending to all mould-boards whose faces are *worked to circular or spheric lines*, forming a *segment of a loxodromic or spiral curve*, (which general description would apply to mould-boards already in use, and under that construction the patent would, consequently, be void,) but as applying only to mould-boards whose faces are worked upon transverse circular lines, whose radii are in the *exact* proportion of thirty-six to twelve. The word "*about*" must be rejected for uncertainty.
2. That it is the province of the Court to construe the patent and determine what improvements are intended to be patented, and of the jury to decide whether those improvements are described in the patent with sufficient clearness to enable a skilful mechanic to construct a machine thereby. In deciding this question, the jury should give a liberal common sense construction to the directions contained in the specification.
3. That so much of the patent as relates to the face of the mould-board, is not violated, unless the same circular lines are adopted as are described in the specification, but if the imitation be so nearly exact as to satisfy the jury that the imitator intended to copy the model, and to make some

## PATENT RIGHTS. CONSTRUCTION OF PATENT LAWS.

almost imperceptible variation for the purpose of evading the right of the patentee, this may be considered as a fraud on the law, and such slight variation may be disregarded.

4. That a particular description of the mould-boards formerly in use, is not necessary to give validity to the patent; a reference to them in general terms, which are not untrue, or a reference to a particular mould-board generally known, accompanied by such an intelligible description of what is new, as will enable a workman to distinguish it from the old, is sufficient.
5. That although the act of Congress declares, "that *simply* changing the form or proportion of any machine, shall not be deemed a discovery," yet, when the change of form or proportion produces a new effect, of which the jury must judge, it is not *simply* a change of form or proportion, and does not come within the inhibition of the statute. *Davis v. Palmer*, and *The Same v. McCormick*. 298.

## PAYMENT. See PROVISIONAL PAYMENT.

## PLEADING.

- I. The law which governs pleading in Virginia is different from that which regulates it in England. In England, the courts exercise a controlling power over the defendant who seeks to plead inconsistent matters, conferred by 4th and 5th Anne, ch. 16, and it is discretionary with them to receive or reject the inconsistent pleas which may be tendered. But in Virginia, the right to "plead as many several matters, whether of law or of fact, as he shall think necessary for his defence," is expressly given by statute, and the courts cannot control that right, *if the pleas be offered in time*. [Where they are not so offered, (as where the defendants permitted a writ of inquiry to be entered against them, and the term at which it might be set aside to pass away without pleading,) the English doctrine then applies, and the right depends upon the favour of the court.] Hence, when in an action of assumpsit, the defendants at the rules pleaded both the general issue and demurred, and the plaintiffs took issue on the plea, but refused to join in demurrer, this was held to be a discontinuance, by virtue of the act of assembly, and the plaintiffs were nonsuited, though they were permitted to reinstate their cause. *Furniss, Catler & Stacey v. Ellis & Allan*. 14.
- II. A demurrer is in its nature a plea to the action, and will not be considered as a plea in abatement, though the special causes alleged for demurring be matter of abatement. The court will disregard those special causes, and considering the demurrer independently of them, will decide upon it as if they had not been inserted in it. *Ibid*.
- III. The plaintiffs' counsel filed a memorandum with the clerk, and the latter in filling up the writ, mistook the name of one of the plaintiffs. The clerk also drew the declaration in which the same mistake occurred. Upon a motion to amend the pleadings, it was held: 1. That the memorandum of counsel was a document by which the error in the writ might

PLEADING.

be amended, on the ground of *clerical mispision*. 2. That the error in the declaration might also be amended, but *not on the ground of clerical mispision*. It is no part of the clerical duty to prepare the declaration for counsel. In such a case, the clerk must be regarded as the agent of the attorney, and the declaration is to be treated as if it was drawn and filed by the attorney himself. Therefore, though the court should give leave to amend the declaration, *when amended*, it must be considered as a *new declaration*, and the defendants should be permitted to plead *de novo*. *Ibid*.

- IV. To avoid circuity of action, a covenant may pleaded as a release; but it must be a covenant between those parties only; and if it contains no words of release, it will not be construed such, unless it gives the covenantee a right of action which will precisely countervail that to which he is liable; and unless, too, it was the intention of the parties that the last instrument should defeat the first. *Garnett, Executor of Brooke v. Macon et al.* 185.

POST-OFFICE DEPARTMENT.

A mail carrier is within the 18th sec. of the "Act regulating the Post-Office Establishment," subjecting to a penalty in certain cases, "persons employed in *any of the departments* of the General Post-Office." *United States v. Belew.* 280.

PRESUMPTION OF LAW, PRIMA FACIE.

- I. It is a general rule, that a long acquiescence in letters containing accounts is *prima facie* evidence of the correctness of their contents. *Hopkirk v.* Page. 20.
- II. When a protested bill of exchange is held up for a long time without notice of its non-payment and protest, the whole *onus probandi* is thrown upon the holder. He must prove every thing, and nothing is required from the drawer. *Ibid*.
- III. W. B., living in Virginia, drew a bill of exchange in November, 1775, on R. C. & Co., merchants in London, which was duly protested in June, 1776. W. B. died 1777 or 1778. Payment was not demanded of the representative of W. B. till 1819, when suit was instituted on the protested bill. *Quere*, does the doctrine of presumption of payment, arising from lapse of time, which is applicable to sealed instruments, apply to a bill of exchange? *If it does*, such presumption is merely *prima facie*, and the holder may rebut it by accounting for the time which has been permitted to elapse, and by showing the improbability that the debt has been paid. Should this presumption be rebutted, still the plaintiff shall only recover legal interest from the assertion of his claim. *Ibid*.
- IV. See LEGITIMACY, I, II.

PRINCIPAL AND AGENT.

- I. In 1807 a contract was entered into between L. T., widow and administratrix of S. T.; and R. T., a daughter of S. T., of Maryland, and T. M. B.,

## PRINCIPAL AND AGENT.

of Virginia, whereby L. T., as administratrix of her deceased husband, and as guardian of her infant children, and R. T. in her own right, constituted T. M. B. their agent, and stipulated to convey to him a moiety of certain military lands in the state of Ohio, on certain conditions expressed in the contract. This contract, after reciting the title of S. T., deceased, to these lands, which had not been patented, and the descent of them to his widow and children, proceeds thus: "And whereas a considerable portion of the said land has been sold for the payment of taxes:" "now, therefore, in consideration of the said T. M. B. undertaking to redeem the portion of land so sold for the payment of taxes, or as much thereof as he can redeem, at his own proper expense and trouble; and also obtaining all the necessary title papers to the said 4000 acres, or so much thereof as he can obtain at his own proper cost, and trouble, which he doth hereby undertake to do, then, in that case, we, the said L. T. in her own right, and also as guardian of the said E. T. and S. T., jr., and also the said R. T., do agree to convey to the said T. M. B. one half of the said 4000 acres of the said land, or one half of all which shall have been redeemed as being sold, and the half of that unsold." The contract contained a covenant, on the part of L. T. and R. T., that E. T. and S. T., jr., should, when they respectively attained their majority, ratify the agreement and make the necessary conveyances. In 1812, L. T., R. T., and E. T., the two last being then of full age, conveyed to the agent one moiety of these 4000 acres of land which belonged to the heirs of S. T., deceased. The effect of this conveyance was, to execute the contract of 1807, not only as to themselves, but as far as respected the interest of S. T., then a minor. The parties filed their bill to set aside the contract of 1807, and also the deeds of 1812 in execution thereof, on the ground that the contract was entered into, and the deeds were executed, through mistake and ignorance on the part of the plaintiffs, and misrepresentation and concealment on the part of T. M. B. On the trial it was fully proved that R. T. was a minor when the contract of 1807 was entered into. The Court *Held*:

1. That with respect to the contract of 1807, that being the commencement of the defendant's agency, the *onus probandi* was upon the plaintiffs to show the alleged misrepresentation and concealment, and without such proof adduced by them, the Court could not interpose its authority to set aside the contract.
2. That the effect of that contract was to bind the widow according to its terms, i. e., to the extent of her dower-right, and the infants to the extent of the equity it gave for a liberal remuneration for services performed.
3. But the question arising under the deeds of 1812, was a different one. So far as they could be considered a mere confirmation of the contract of 1807, which had been made for them by their mother, to the extent above expressed, they are binding upon R. T. and E. T., though not upon their infant brother. But so much of the contract of 1812 as

## PRINCIPAL AND AGENT.

bound them farther than that of 1807, was not the confirmation of an old, but the execution of an original contract. The principles of equity, do not absolutely annul such a contract (entered into between an agent and his principals), but they subject it to a searching and rigorous examination. They require the agent to show that he withheld no information which his agency enabled him to acquire, that his communications to his principals were full as well as fair. If he cannot do this, the contract must be set aside. *Teakle v. Bailey*. 43.

- II. Where bills are remitted by a merchant to his factor, to be converted into available funds, and the factor mingles the property of the merchant with that of others, by selling the bills on a credit, and taking a joint note, covering other sums than that stipulated to be paid for the bills, this is in accordance with the general usage, and if the parties to the note become insolvent before it is due, the factor will not be held responsible, in consequence of the mere act of taking such note, for the loss sustained by his employer. *Hamilton, Donaldson & Co. v. Cunningham*. 350.
- III. A factor sells bills of his principal to C. on a credit, and takes in payment, a note of previous date, having three months to run, drawn by A. and endorsed by B, who were in good credit at the time; the note is not endorsed by C. *Held*: That the circumstances of the note being of previous date, and not endorsed by the purchaser of the bills, are not sufficient, *per se*, to outweigh the fact, that the drawer and endorser were in good credit at the time of the transaction. *Ibid*.
- IV. Nor was it of any consequence that the name of C., the purchaser, was not communicated by the factor to his principal, the principal not having demanded of his factor the name of the purchaser. *Ibid*.
- V. An agent does not bear the same relation to his principal, that the holder of a bill of exchange does to the drawer or endorser. The same negligence or omission which will deprive the holder of all recourse against the drawer or endorser, will not subject the agent to his principal, to the extent of the bill placed in his hands for collection. *Ibid*.
- VI. The relation of principal and agent, is governed by general rules of law, founded on reason, and if the principal suffers, through the remissness or negligence of the agent, the actual loss sustained by the principal, in consequence of such misconduct, is the standard by which his damages must be measured. But the law merchant prescribes with exactness, the course to be pursued by the holder of a bill, and has substituted a peculiar standard by which damages are to be measured for any deviation from that course. *Ibid*.
- VII. The factor to whom commercial paper is transmitted for collection, but who does not make himself a party by putting his name upon the paper, is an ordinary agent, governed by the law which regulates the relation of principal and agent generally, and is not subject to the law merchant. *Ibid*.

## PRINCIPAL AND SURETY. See SURETIES, I.

PRIORITY OF THE UNITED STATES. *See* INSOLVENCY, I, II, III, IV, V.

## PROVISIONAL PAYMENT.

- I. Where bills of exchange are transmitted by a debtor to his creditor to be sold, and the debtor directs the creditor to credit him with the proceeds; and the creditor sells the bills, partly for cash and partly for negotiable notes, and gives the debtor credit in his books for the amount, in two distinct items, first, for the notes, and secondly, for the balance in cash; this is a mere *provisional* payment, and if the notes be not paid, he may recur to his original claim, unless, by his subsequent conduct, he converts the *provisional* into an *absolute* payment. Hamilton, Donaldson & Co. v. Cunningham. 350.
- II. But a payment which is merely *provisional* in its inception may, by legal intendment, be converted into an *absolute* payment, by the subsequent conduct of the creditor; and whether this has been done or not, must depend essentially upon the circumstances of the particular case. Thus, where the debtor in Virginia, sent to his factors, a commercial house in New York, (who were also his creditors), bills of exchange, with instructions to sell them and credit him with the proceeds; and the factors and creditors sold them, partly for cash, and partly for credit, for negotiable paper having some time to run, and credited the debtor on their books with the proceeds, but, when the paper was subsequently protested for non-payment, the factors did not, as commercial usage required them to do, communicate the fact to the debtor, though they had a regular correspondence with him, and several letters passed between them after the protest; though one of the partners was afterwards in Virginia, and received a considerable payment from the debtor in person; and where the creditors, after the protest, transmitted an account of the balance due them by their debtor, not including therein the amount of the protested notes, and themselves, without consultation with the debtor, instituted suits upon the protested notes against the endorser, and prosecuted it to judgment, but did not issue execution thereon; these circumstances, taken together, converted the *provisional* into an *absolute* payment; and on a suit by the creditors against the debtor to recover the balance due, the debtor was held to be entitled to a credit for the amount due upon the protested notes. *Ibid.*

## PURCHASER.

- I. To sustain the vendee's allegation that the contract was abandoned by implication, the conduct of the vendor ought to be such, as to justify a reasonable man in believing that he acquiesced. Garnett v. Macon et al. 185.
- II. The court of chancery has established it as a rule, that where the charge is general, the purchaser is not bound to see to the application of the purchase-money. *Ibid.*
- III. But if the trustee sells with the avowed purpose of excluding the debts of him who created the trust, the purchaser voluntarily assisting him in it, would not be secure. *Ibid.*



**PURCHASER.**

- IV. And if he have notice of a debt before he pays the money, he may be affected if he proceeds with the purchase. *Ibid.*
- V. If the executor sells a chattel, specifically devised, to a person who knows there are no debts, the purchaser takes the property subject to the bequest. *Ibid.*
- VI. Both on principle and authority, a specific performance will not be decreed at the instance of the vendor, unless his ability to make a title be unquestionable. *Ibid.*
- VII. For, if no incumbrance be communicated to the purchaser, or is known to him to exist, he must suppose himself to purchase an unincumbered estate: *Ibid.*
- VIII. And, therefore, his objections to taking it need not be confined to cases of doubtful title, but may be extended to incumbrances of every description, which may embarrass him in the full enjoyment of his purchase. *Ibid.*
- IX. The English court of chancery has never laid down the broad principle, that time was never important: on the contrary, the present doctrine there is, that where time is really material to the parties, the right to a specific performance may depend upon it; and the same doctrine prevails in the courts of the United States.
- X. Although mere inadequacy of price is not a sufficient ground for a court of equity to refuse its assistance, yet if an unreasonable contract be not performed according to its letter, equity will not interfere. *Ibid.*
- XI. And there is no difference between a contract, unreasonable when made, and one which becomes so afterwards, if the applicant be in fault. *Ibid.*
- XII. The principle is, that a very great change in the value of the article is a serious objection to a decree for a specific performance, where the vendor is in fault, as it may affect the arrangements of the vendee for a compliance with the contract. *Ibid.*
- XIII. Courts of equity extend their control, not only over the acts of trustees, but over the acts of those who have any agency in enabling the trustees to violate their trust. *Wallis v. Thornton's Administrator et al.* 422.
- XIV. Where trustees sell on a credit, and receive the money before it is due, discounting legal interest, it does not operate, in equity, a discharge of the lien, but a court of chancery will consider the lien as still subsisting, and the purchaser as responsible to the creditor. *Ibid.*

**REFUNDING BONDS.** See EXECUTORS AND ADMINISTRATORS, VI.

**RELEASE.**

- I. To avoid circuity of action, a covenant may be pleaded as a release; but it must be a covenant between those parties only; and if it contains no words of release, it will not be construed such, unless it gives the covenantee a right of action which will precisely countervail that to which he is liable; and unless, too, it was the intention of the parties that the last instrument should defeat the first. *Garnett, Executor of Brooke v. Macon et al.* 185.

**RELEASE.**

- II. Parol substitution of a third person for one of several obligors, does not release the rest. *Ibid.*
- III. If there be a joint decree against the executors of two persons, and a creditor receives a moiety of the debt from the representatives of one of them, and covenants not to levy the residue of the decree upon the estate of that one, it does not discharge the representatives of the other. *Ibid.*
- IV. What release to one will discharge the rest of several obligors; and *contra*. *Ibid.*

**RETRAXIT.**

The dismissal of a suit agreed does not amount to a retraxit, and is no bar to a future suit for the same cause of action *Hoffman v. Porter*. 156.

**SET-OFF.**

An officer of the United States, who has levied a sum of money on an execution in favour of the United States, to whom the United States are indebted for fees of office in a sum greater than the amount of the execution, has a right to retain it by way of set-off, and on a motion made on the part of the United States to commit the officer for failure to pay over the money so levied, he will be permitted to show that the United States are indebted to him; and if this be shown, it is sufficient cause why he should not be attached. *The United States v. Mann*. 9.

**SPECIFIC PERFORMANCE.**

- I. Both on principle and authority, a specific performance will not be decreed at the instance of the vendor, unless his ability to make a title be unquestionable. *Garnett v. Macon et al.* 185.
- II. For, if no incumbrance be communicated to the purchaser, or known to him to exist, he must suppose himself to purchase an unincumbered estate: *Ibid.*
- III. And, therefore, his objections to taking it need not be confined to cases of doubtful title, but may be extended to incumbrances of every description, which may embarrass him in the full enjoyment of his purchase. *Ibid.*
- IV. The English court of chancery has never laid down the broad principle, that time was never important: on the contrary, the present doctrine there is, that where time is really material to the parties, the right to a specific performance may depend upon it; and the same doctrine prevails in the courts of the United States. *Ibid.*
- V. Although mere inadequacy of price is not a sufficient ground for a court of equity to refuse its assistance, yet if an unreasonable contract be not performed according to its letter, equity will not interfere. *Ibid.*
- VI. And there is no difference between a contract, unreasonable when made, and one which becomes so afterwards, if the applicant be in fault. *Ibid.*
- VII. The principle is, that a very great change in the value of the article is a serious objection to a decree for a specific performance, where the vendor is in fault, as it may affect the arrangements of the vendee for a compliance with the contract. *Ibid.*

**STAY OF EXECUTION.**

- I. T. R. being possessed of a large estate, made a division of it among his three sons, A. C. R., I. R. and T. R., and in consideration thereof, directed them to execute their bonds to R. H., the husband of the donor's daughter, for £250 each. J. B. obtained a judgment against T. R., the elder, after the division of his estate. Execution on the judgment was stayed, the plaintiff entering into an agreement with A. C. R., whereby it was stipulated that A. C. R. should pay the debt in three annual instalments. T. R., the elder, and his three sons, all became insolvent before the payment of the said debt. *Held*: That the stay of execution does not discharge R. H. from his liability to pay to the creditor any money received by him in payment of the bonds, although, when the judgment was rendered, A. C. R. possessed sufficient property to satisfy it. The principle, that where any indulgence is extended by a creditor to his debtor, and the debtor subsequently becomes insolvent, the creditor loses his recourse against the surety, does not apply in favour of a mere donee. *Hepkirk v. Randolph et al.* 132.
- II. The lien of a judgment on which execution is stayed, dates, not from the rendition of the judgments, but from the time when execution may be sued out. *Bank of the United States v. Winston's Executors et al.* 252.

**SUBSTITUTION.**

- I. See SURETIES, IV, V.
- II. See MARSHALLING ASSETS.

**SURETIES.**

- I. In a suit brought by the United States against the representatives of a surety of M. and H., contractors to furnish rations to the troops of Virginia and Maryland, for the year 1802, a letter from the department of war, not authenticated in the form prescribed by the act of Congress, claiming advances made to the principals, up to the 6th of January, 1803, is inadmissible in evidence, and no admission of its correctness, express or implied, by the principals, can bind the surety. *Pendleton's Executor v. The United States.* 76.
- II. See OFFICIAL BONDS, III, VI.
- III. The duty of the government to secure its debts, necessarily infers the means of securing them, and sureties may therefore be required to the bond given by the debtor. *The United States v. Maurice et al.* 97.
- IV. Where there are two sureties on bills of exchange and specialties, and one of them has paid more than his proportion, and his representatives seek contribution out of the estate of his co-surety, the surety who has overpaid will be subrogated to the rights of the creditor. Equity would, indeed, restrain him from recovering more than his proportion, but to that extent, his claim upon his co-surety is precisely as valid as upon his principal, and the representatives of the surety who has overpaid, are entitled to rank according to the dignity of the claims on which such excess was paid. The principle of substitution applies equally to cases arising between co-sureties and those between a surety and his principal. *Lidderdale v. Robinson.* 159.

## SURETIES.

- V. Where money is paid by a surety for his principal, the surety is subrogated to all the rights of the creditor whose debt he has discharged. But *quære*—Is this ever done in favour of a person not bound by the original security, who discharges it as a volunteer? *Bank of the United States v. Winston's Executors et al.* 252.
- VI. The act of Congress respecting delinquent collectors and their sureties, created a lien on the land of the parties to the official bond; but the lien cannot be enforced until all the personal estate is exhausted, and on a joint judgment obtained against all the parties to the bond, the personal estate of all, liable to the execution must be exhausted, before the land of any one of them can be reached: in other words, the land of one surety, *who has no personal estate*, cannot be subjected to the payment of any part of the judgment, while there is personal estate in the hands of another surety, *who has paid his aliquot part of the debt*. *The United States v. Graves et al.* 379.
- VII. As to the equitable relations between sureties and their principal, and sureties and sureties, see case last cited.

## TREASURY DEPARTMENT.

- I. The rules prescribed by the treasury department for the adjustment of claims against the government, will, if reasonable, be respected; but if these rules go to a complete denial of justice, the Court, if it have jurisdiction of the subject, cannot disregard the rights of the parties. *The United States v. Mann.* 9.
- II. The act of Congress, passed on the 15th of May, 1890, "to provide for the better organization of the treasury department," which gives a new and summary remedy against officers of the United States, who have received public money for which they have failed to account, and against their sureties, substituted, by implication, the new and sufficient bond called for by that act, for the former bond, and discharged the sureties to the original bond, so far as respected subsequent transactions. *The United States v. Maurice et al.* 96.
- III. A party was arrested and held in custody, by virtue of a distress warrant, issued from the treasury department, under an act of Congress passed the 15th of May, 1890, "to provide for the better organization of the Treasury Department." The act provides, in substance, for the issuing of this warrant by the agent of the treasury, against all military and naval officers, &c., charged with the disbursement of the public moneys, who shall fail to pay and settle their accounts at the treasury department. The party now in custody, was a lieutenant in the navy of the United States, and had officiated as *acting purser* of a national ship, supplying a vacancy occasioned by the death of the regularly commissioned purser of the ship, on the Mediterranean station, and had executed no official bond as purser. On his return to the United States, he had settled his account at the proper department, viz., in 1828; and in 1833, the then fourth auditor, opened and re-stated his account, on the ground that it had been erroneously settled in the first instance, and the account, as re-

## TREASURY DEPARTMENT.

stated, exhibited a large balance against the party, due to the United States. Upon this re-stated account, the distress warrant was issued, by virtue whereof, the party was arrested and was brought up under a writ of *habeas corpus*, directed to the officer, who executed the warrant and held the petitioner in custody. *Held*:

1. That the account of the petitioner as acting purser, having been once stated, and settled at the treasury department, the law invests the auditor with no power to open and re-settle it, of *his own mere authority*. The act creates a special and limited jurisdiction, and after the accounts of any of the class of officers on whom it was intended to act, have been adjusted, however erroneously, that special jurisdiction is *functus officio*, and any process issued upon a re-settlement of such accounts, is absolutely *null and void*. Per Barbour, J.
2. That, assuming that the act, under which this arrest was made, does not violate the Constitution of the United States, which declares, that "the *judicial power* of the United States, shall be vested in one supreme court, and in such inferior courts as Congress shall from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour," and extends the judicial power to "controversies to which the United States shall be a party;" yet, the authority vested by this law in certain agents of the treasury, and all acts done in pursuance thereof, are *purely ministerial*. The statement or certificate, authorized by the act, is not a *judgment*, and the warrant which coerces payment, is not *judicial process*. They are *ministerial acts*, (for, otherwise, they could not be sustained,) and the general principles of construction require, that the authority vested by the act, shall be strictly and literally pursued. Per Marshall, C. J.
3. That the act does not apply, in sound construction, to every commissioned officer of the army or navy of the United States, to whose hands any public money may be entrusted, but only to those regularly appointed disbursing officers, who have given official bonds, with sureties for the faithful discharge of the duties of their office; it does not embrace a mere *acting purser* in the navy. *Ib*.
4. That the construction put by the court upon this act, does not affect the *responsibility* of a temporary *acting* disbursing officer of the army or navy, but simply denies *his liability to the particular process authorized by the act*. The *responsibility* of such an officer, is precisely the same, with that of the regularly appointed officer, who has given his official bond with surety, and if his account has been erroneously settled, it may be opened, and any balance remaining due from him to the United States, may be recovered in a regular course of legal proceeding. *Per Curiam*.
5. That in case of an erroneous settlement, a bill in equity would lie to surcharge and falsify, as in the case of a settled account between individuals; and *quære*, if even *at law*, though the settled account would be *prima facie* evidence, the true balance might not be recovered upon proving mistakes and omissions?—Per Barbour, J. *Ex parte Randolph*. 447.

## TRUSTS, TRUSTEES.

- I. See HUSBAND AND WIFE, VII, VIII.
- II. If bonds are made payable on or *before* the day mentioned in the condition, but the decree under which the sale is conducted, does not authorize the insertion of these words, it seems that the trustees have no right to receive the money before the day; if they had, the *cestui que trust*, might be injured, without having an opportunity of providing for his safety. But, admitting that the trustees have a right to receive the money before it is due, they have no right to discount legal interest and receive only a part of the debt. *Wallis v. Thornton's Administrators et al.* 422.
- III. Courts of equity extend their control, not only over the acts of trustees, but over the acts of those who have any agency in enabling the trustees to violate their trust. *Ibid.*
- IV. Where trustees sell on a credit, and receive money before it is due, discounting legal interest, it does not operate, in *equity*, a discharge of the lien, but a court of chancery will consider the lien as still subsisting, and the purchaser as responsible to the creditor. *Ibid.*
- V. If, in the regular execution of a trust, money is paid to a trustee, his co-trustee is not liable for it, merely because he joined in the receipt; but if the trustee who received the money, had no right to receive it, his co-trustee who joins in the receipt, is considered as co-operating in a breach of trust, and will be involved in its consequences. *Ibid.*

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- I. An officer of the United States, who has levied a sum of money on an execution in favour of the United States, to whom the United States are indebted for fees of office in a sum greater than the amount of the execution, has a right to retain it by way of set-off, and on a motion made on the part of the United States to commit the officer for failure to pay over the money so levied, he will be permitted to show that the United States are indebted to him: and if this be shown, it is sufficient cause why he should not be attached. *The United States v. Mann.* 9.
- II. The rule prescribed by the treasury department for the adjustment of claims against the government, will, if reasonable, be respected; but if these rules go to a complete denial of justice, the Court, if it have jurisdiction of the subject, cannot disregard the rights of the parties. *Ibid.*
- III. See OFFICIAL BONDS, I.
- IV. The Constitution of the United States, art. 2, sec. 2, which declares that the President "shall nominate, and, by and with the consent of the Senate, shall appoint ambassadors, &c.," "and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law," taken in connexion with the subsequent clause of the same section, which authorizes Congress "by law to vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments;" and with the third section of the same article, empowering the President to fill "all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next ses-

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- sion:" is interpreted to declare, that all offices under the federal government, except in cases where the Constitution itself may otherwise provide, shall be established by law. *The United States v. Maurice et al.* 96.
- V. An agent of fortifications is an officer of the United States, whose office is established by law. See Acts of Congress of April 24th, 1816, sec. 9, and March 2d, 1821, sec. 13.] *Ibid.*
- VI. The act of Congress, passed on the 15th of May, 1820, "providing for the better organization of the treasury department," which gives a new and summary remedy against officers of the United States, who have received public money for which they have failed to account, and against their sureties, substituted, by implication, the new and sufficient bond called for by that act, for the former bond, and discharged the sureties to the original bond, so far as respected subsequent transactions. *Ibid.*
- VII. Appointments to office can be made by the heads of department, in those cases only which Congress has authorized by law, and, therefore, the appointment of an agent of fortifications by the secretary of war, there being no act of Congress conferring that power upon that officer, is irregular. *Ibid.*
- VIII. An official bond given by an agent of fortifications, whose appointment was irregular, but whose office is established by law, though void as a statutory obligation, is valid as a contract to perform the duties appertaining to the office of agent of fortifications, and is binding on his sureties. Contract is one of the means necessary to accomplish the objects of the institution of the government, and the capacity of the United States to contract, is co-extensive with the duties and powers of government. Every contract which subverts to the performance of a duty, may be rightfully made. *Ibid.*
- IX. It is not essential to the validity of a contract made between an individual and the government, that it should express the circumstances under which it was made, so precisely and distinctly, as to show the motives which induced it, and the objects to be effected by it. These are matter of evidence. *Ibid.*
- X. The duty of the government to secure its debts, necessarily infers the means of securing them, and sureties may therefore be required to the bond given by the debtor. *Ibid.*
- XI. Every contract which is legal on its face, and imports a consideration, is supposed to be entered into on valid considerations, and to be obligatory, if the parties be ostensibly able, until the contrary is shown, and the same rule applies to a government which is capable of making contracts. *Ibid.*
- XII. That is certain which may be rendered certain, and, therefore, if the condition of a bond, instead of specifying the particular purposes for which the bond is given, refers to a paper which does specify them, it is equivalent to the enumeration of those purposes in the bond itself. *Ibid.*
- XIII. Where an appointment to office is irregular—is contrary to law and its policy, this does not absolve the person so appointed from the moral and

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legal obligation to account for public money, which had been placed in his hands in consequence of such appointment. *Ibid.*

- XIV. An Act of Congress, (Act of March 3, 1797, sec. 5), declares, that where a revenue officer, indebted to the United States, shall become insolvent, the debt due to the United States shall first be satisfied, and that this priority shall extend to cases where a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof. *Held*, that although this act gives to a debt due to the United States a priority over debts due to individuals, it does not give to one part of a debt due to the United States a priority over any other part of it: nor does it vest the property absolutely in the United States, though it gives them a right to pursue it for the purpose of appropriating it in payment; nor does it affect the right of the debtor to *apply a payment* of money in his hands, to either a bond debt, or a debt due by open account by him to the United States. *The United States v. Cochran et al.* 274.

- XV. Therefore, where a collector of the revenue at a port, had given bond with sureties in the penalty of \$10,000, for the faithful discharge of his official duties, and being largely indebted to the United States, had made a deed of his property for their benefit, but previously thereto, had transferred \$10,000 to his sureties, and directed them to apply that money to their exoneration, and the sureties accordingly did so apply it, by paying it into the treasury, and receiving from the treasury their obligation, without any knowledge at the treasury that the money so paid had been transferred by the collector himself to his sureties; it was adjudged that by applying that payment to the extinguishment of the bond, the sureties were discharged. *Ibid.*

- XVI. Though "The United States" is a stockholder in the Bank of the United States, and is, so far, a party in all suits to which the Bank is a party, the doctrine *nullum tempus occurrit regi* does not apply to exempt the Bank from the operation of the Act of Limitations: for it is a well settled principle, that where a sovereign becomes a member of a trading company, it divests itself, with reference to the transactions of the company, of the prerogatives of sovereignty, and assumes the character of a private citizen. *The Bank of the United States v. M'Kenzie.* 393.

- XVII. The United States being plaintiffs and their debtors being entitled, by the award of commissioners under the treaty with France, to a sum of money more than adequate to the payment of their debt; *Held*: that, although the United States may *elect* to retain the amount of their debt, it is altogether discretionary with them whether they will do so or not; and the right to retain, constitutes no impediment to the prosecution of their suit in a court of equity. *The United States v. Myers et al.* 517.

VENDEE. *See* PURCHASER.

## WAR.

A bill of exchange was drawn in Virginia, in November, 1775, after the commencement of hostilities between Great Britain and her colonies,



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payable in England, which was duly protested for non-payment in June, 1776, after all intercourse between the two countries had ceased. *Held*, that a state of war dispenses with the necessity of giving notice of the non-payment and protest to the drawer, but notice of its dishonour should be given within a reasonable time after the impediment is removed. *Hopkirk v. Page*. 20.

## WASTE.

An action of waste is not maintainable against a tenant by elegit, either upon the principles of the common law, or under the statute of Virginia. *Scott and Lyle v. Lenox*. 57.

## WIDOW.—DOWER, DISTRIBUTION.

- I. Under the act of Assembly of Virginia, (1 Rev. Co. ch. 107, sec. 10,) which declares, that if a wife willingly leave her husband, and go away and continue with the adulterer, she shall forfeit her dower, &c.; that part of the provision which relates to her willingly leaving her husband, is satisfied by any separation which is voluntary on her part, and any separation is voluntary which is not brought about by the husband's act, or by some constraint on her person. Therefore, where the husband wished his wife to accompany him, and she refused, although her parents objected to her going, and she excused herself on that ground, and because of reports that he was married to another woman, the separation must be considered voluntary on her part. *Stegall et al. v. Stegall's Administrator et al.* 256.
- II. The words "and go away and continue with the adulterer," are satisfied by an open state of adultery, whether the woman reside in the same house with the adulterer, or in another house; whether in her own, or a friend's house, or his; or whether with or without the ceremony of marriage; in either case, she forfeits dower. *Ibid.*
- III. The claim of the wife to a distributive share of her husband's personal estate, stands on a different ground; her right to it under the statute of distributions is absolute, and she does not forfeit it by her conduct, however unworthy; (1 Rev. Co. ch. 104, sec. 29;) and the court of equity is bound to carry this statute into effect, though the conduct of the claimant in equity has been reprehensible. *Ibid.*

WIFE. *See* HUSBAND AND WIFE.

## WILLS, CONSTRUCTION OF.

- I. A testator made his will in Virginia, disposing of his estate among his wife and children, which will contained the following clause:—"It is farther my will that my wife shall clothe, maintain, and educate my children, in the best manner that the circumstances of the estate herein or hereby given, or to be given or bequeathed to her, will admit; and that she shall consult my executors hereinafter named, as to the mode of my said children's education." The executors appointed by this will were the testator's brothers, J. and S. Some eighteen months after the date of this will, the testator made an additional will in England, ratifying and con-

## WILLS, CONSTRUCTION OF.

firming his former will, disposing of property acquired subsequently to the execution of the first will. By the English will, the testator bequeathed pecuniary legacies to his children, to be paid out of the subsequently acquired estate, and £50 per annum to his wife, chargeable on those legacies. He then added: "And do will and direct that the *guardians* of my said children, by my said former will appointed, shall, by their bond, of a sufficient penalty, &c., secure to be paid to my said wife, for her life, as aforesaid, out of the moneys coming to their hands, or which they shall be in the receipt of, for the use of, or in trust for, my said children, the said annuity or yearly sum of £50." The testator appointed by this will P. and H. (both in England) "*guardians of the persons and estates of (his) said children, during and until such time as the several sums of money by (him) hereinbefore bequeathed to them (could) be paid, for their use and benefit, into the hands of the several persons by (him) nominated and appointed guardians of the persons and estates of (his) said children, under the said will and deposition by (him) made and executed, prior to (his) departure from America, as aforesaid.*" "And I hereby appoint the said P. and H. joint executors in trust of this my will." P., one of the executors and guardians under the English will, failing for a long period of time to account for the moneys which came to his hands, to a large amount, and eventually becoming insolvent, this suit was brought by the legatees, *inter alia*, to subject J. and S. to the payment of P.'s debt. *Held*:

1. That the first will did not appoint the executors J. and S. guardians also of the testator's children. Though no form of words is prescribed for the appointment of a guardian, and such appointment may be made by words of implication, yet these words must convey the powers essential to the office.
2. Nor does the recognition, in the English will, of the executors under the Virginia will as guardians, amount to an appointment of them, by implication, to that office. It is true that the two papers constitute, *in point of law*, but one will, but they are not to be so considered *in point of fact*. Had the English will been written (by way of codicil) on the same paper with the Virginia will; or had the Virginia will been before the testator when the English will was written, the subsequent clauses could not have been founded in ignorance or forgetfulness of the provisions of the Virginia will, but would have shown the construction put by the testator upon his own words, and that those words were intended to appoint, and did in fact appoint, the executors, J. and S., guardians also. In such case, *it seems* that the court would be bound to adopt the testator's construction. But in this case, there is no reason to suppose that the Virginia will was before the testator when he drew the English will. The testator relied upon his memory, and this betrayed him into the error of supposing that by his former will, he had appointed J. and S. guardians, when that will, in fact, contained no such appointment. The question is not, whether a testator has a right to construe his own language, employed in a former

## WILLS, CONSTRUCTION OF.

will, but whether a plain *mistake* respecting that language shall control its natural construction, and give to it a meaning which it will not bear? This is forbidden, both by authority and by general principles.

3. *Quære*, whether the fact, assuming it to be true, that the executors under the first will acted as guardians, could influence the construction of the will? The proof that they did act in that character should at least be unequivocal. A general understanding that they were guardians, founded on the care taken by them of the infants and their estates, could not make them guardians: nor the fact of their signing their names (without adding their characters as guardians), to a direction to a clerk to issue a marriage license to one of the female infants, though it would have amounted to an acceptance of the guardianship, had the appointment been explicit.
4. But supposing J. and S. to have been guardians as well as executors, *quære* if they would be chargeable, in their character of guardians, with legacies which they never received, and which, in strictness, never constituted a part of the ward's estate?
5. Nor were J. and S. responsible, *as executors*, for the legacies which came to P.'s hands. P. was both guardian and executor under the English will, and he received the legacies in one of those characters; if as guardian, the executors had no right to sue him for money of the wards which came lawfully to his hands, if it was not required for the payment of debts: if as executor, his co-executors could not sue him. The English will, too, directed the money to be paid to the *guardians* in Virginia, and not to the executors. The legatees, and not the executors, were the *cestuis que trust*, and they alone could coerce the execution of the trust. *Gaines et al. v. Spanan's Executors et al.* 81.

- II. A testator devises his estate to his four brothers and sisters, and to their children; but if "they should all die without leaving any issue of the body of either of them alive at the time of the death of the survivor of them; or if such issue should all die before attaining the age of twenty-one years aforesaid, then I desire, &c." The term *issue* comprehends as well the more remote descendants as the children of the devisees, and, consequently, the remainder over is too remote, being limited to take effect on a contingency which may not happen during a life in being, and twenty-one years afterwards. *Maxwell et al. v. Call, Executor of Means et al.* 119.

- III. W. B., by his last will, created, in the first instance, a separate fund, consisting of land, one hundred negroes, and other personal estate, for the payment of his debts, and then gave to his wife, for life, certain plantations, *with all the remaining negroes*, and stock of all sorts. He then directed that at the death of his wife, all his "estates whatsoever, consisting of land, negroes, stocks of all sorts, plate, books, and furniture, be sold as soon as convenient, and the money arising from the sale thereof be equally divided among all (his) children that are alive, &c." By a subsequent clause of the will, the testator, after devising certain lands to his son J., bequeathed to him "his choice of ten negroes, after (his) wife

## WILLS, CONSTRUCTION OF.

(had) chose such as she (pleased)" over and above his share of the money aforesaid. In like manner the testator proceeded to make specific bequests of slaves to several of his other children. The separate fund created for the payment of debts proving wholly inadequate for that purpose, the whole estate, real and personal, including the specific legacies of slaves, was sold by the executor, and after the payment of all the debts out of the general fund, a considerable sum remained to be distributed among the legatees. The question submitted to the Court was: In what proportions should this residuum be distributed between the specific and general legatees of W. B.? The Court *Held*: That in the construction of a will, the whole of it must be taken together, and the intent of the testator collected from the entire instrument, without paying too much regard to the arrangement of the clauses. The general clause, bequeathing all the testator's *remaining negroes, &c.* to his wife, for life, and directing his whole estate, of every description whatsoever, to be sold at her death, and the proceeds to be equally distributed among his children, is clearly restrained by the subsequent clauses, giving specific legacies to some of them, as well those bequeathing a certain *number*, as those which designated the slaves by *name*. The will must be construed as if the clauses giving specific legacies had preceded the general clause providing for his wife, and the word "remaining," in that clause, must be understood as having reference as well to the *specific legacy* clauses, as to that creating a separate fund for the payment of debts. If, then, the sale of the negroes specifically bequeathed was not required for the payment of the testator's debts, the legatees were entitled to them, respectively, during the life of the widow, and if they were sold by the executor, not for the payment of debts, but under the general clause directing the sale of the whole estate, the proceeds of such sale represent the slaves themselves, and the specific legatees are entitled to them. *Byrd v. Byrd's Executor et al.* 169.

IV. Parol evidence is not admissible to affect the construction of a will, but it is admissible where its introduction is required by considerations extrinsic of the will, and which, necessarily, depend upon such evidence. *Gallego v. Gallego's Executor.* 285.

V. Where the testator advanced money in his lifetime to a *husband*, whose wife was a relation, and would be, at his death, an heir and distributee of the testator, and directed that the husband should be debited with the amount, that it might be deducted, after the testator's death "from the share coming to the family;" and the testator *afterwards* made his will, bequeathing a legacy to the *wife*: *Non constat*, that the testator designed that the advance made to the *husband* should be deducted from the legacy bequeathed to the *wife*. The whole legacy was decreed to be paid to the wife, without discounting the husband's debt. *Ibid.*

VI. See EQUITABLE ASSETS, I.

THE END.



